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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ALTERMAN TRANSPORT LINES, INC., ET AL.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

PARTIES TO APPEAL

The Appellants to this appeal are twenty-seven irregular-route interstate motor carriers.[1]

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[1] Alabama Highway Express, Inc., a body corporate and a resident of the State of Alabama; Bowman Transportation, Inc., a body corporate and a resident of the State of Alabama; Deaton Truck Line, Inc., a body corporate and a resident of the State of Alabama; Refrigerated Transport Co., Inc., a body corporate and a resident of the State of Georgia; Virginia-Carolina Freight Lines, Inc., a body corporate and a resident of the State of Virginia; Armellini Express Lines, Inc., a body corporate and a resident of the State of Florida; Bilyeu Refrigerated Transport Corporation, a body corporate and a resident of the State of Missouri; Commercial Carrier Corporation, a body corporate and a

OPINION

The opinion delivered in the court below is not as yet reported. A copy of the opinion is attached as Appendix I.

JURISDICTION OF APPEAL

This is an appeal from a three-judge decision of the United States District Court for the District of Tennessee, Middle Division, denying Appellants injunctive relief against the enforcement of a state statute alleged to be unconstitutional. The specially convened lower court dismissed the Complaint and denied a Motion for Preliminary Injunction for want of federal jurisdiction by Order dated October 11,

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resident of the State of Florida; Pre-Fab Transit Co., a body corporate and a resident of the State of Illinois; Holloway Motor Express, Inc., a body corporate and a resident of the State of Alabama; Jack Cole Company, Inc., a body corporate and a resident of the State of Alabama; Diamond Transportation Systems, Inc., a body corporate and a resident of the State of Wisconsin; Fischbach Trucking Co., a body corporate and a resident of the State of Ohio; Florida Refrigerated Service, Inc., a body corporate and a resident of the State of Florida; Greenstein Trucking Company, a body corporate and a resident of the State of Florida; Melton Truck Lines, Inc., a body corporate and a resident of the State of Arkansas; Ringle Express, Inc., a body corporate and a resident of the State of Indiana; Warren Transport, Inc., a body corporate and a resident of the State of Nebraska; Webb Transfer Line, Inc., a body corporate and a resident of the State of Kentucky; Frozen Food Express, a body corporate and a resident of the State of Texas; Hennis Freight Lines, Inc., a body corporate and a resident of the State of North Carolina; Blue Ridge Transfer Company, Inc., a body corporate and a resident of the State of Virginia; Floyd & Beasley Transfer, Inc., a body corporate and a resident of the State of Alabama; Eagle Motor Lines, a body corporate and a resident of the State of Alabama; Alterman Transport Lines, Inc., a body corporate and a resident of the State of Florida; Harper Motor Lines, Inc., a body corporate and a resident of the State of Georgia; Yeary Transfer Company, Inc., a body corporate and a resident of the State of Kentucky.

1966 (a copy of the Order is attached as Appendix II). The Court held that while a substantial federal question was presented, the jurisdiction of a United States Federal Court could not be invoked under those sections of the *United States Code* which provide for jurisdiction without a requirement as to the "value" of the "matter in controversy", and, that the "matter in controversy" did not involve the $10,000 "value" required for jurisdiction under those sections of the *Code* which demand a minimum jurisdictional amount. A Notice of Appeal to this Court was filed in the District Court of the United States, for the Middle District of Tennessee, on November 8, 1966.

I

STATUTORY PROVISION FOR APPEAL

The jurisdiction of this appeal is based on Title 28 of the *United States Code,* Section 1253.

II

CASES SUSTAINING JURISDICTION

The following cases sustain the jurisdiction of this appeal: *Baker* v. *Carr,* 369 U.S. 186 (1962); *Kesler* v. *Dept. of Public Safety,* 369 U.S. 153 (1962); *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73 (1960); *Evers* v. *Dwyer,* 358 U.S. 202 (1958); *Doud* v. *Hodge,* 350 U.S. 485 (1956); *Query* v. *United States,* 316 U.S. 486 (1942); *California Water Service Co.* v. *Redding,* 304 U.S. 252 (1938). The *Florida, Evers,* and *Doud* cases are identical to the instant case in that in these cases direct appeals were allowed by this Court from three-judge district court decisions dismissing cases on jurisdictional grounds without a ruling on the merits. (See, for example, the Jurisdictional Statement in the *Florida* case—No. 49, 1958 Term at pages 3, 4; 14 and

15. That Appellants have an absolute right of appeal to this Court from a final judgment rendered by a properly convened three-judge court, see *Radio Corp.* v. *United States,* 341 U.S. 412, 415 fn. 4, aff. 95 F. Supp. 660, 664 (1951).

In an injunctive action challenging a state statute on a substantial federal constitutional ground, both the three-judge court and this Court on direct appeal have jurisdiction over all claims raised against the state statute. Once a three-judge court has obtained jurisdiction by virtue of a substantial federal question, it, and this Court, can dispose of a case on non-constitutional grounds, or even a local issue, and both courts can do so without passing upon the federal question upon which they based jurisdiction. See *Zemel* v. *Rusk,* 381 U.S. 1 (1965); *U. S.* v. *Georgia Pub. Serv. Comm'n,* 371 U.S. 285, 287 (1963); *Florida Lime Growers* v. *Jacobsen, supra*; *Query* v. *United States, supra* p. 4; *Lee* v. *Bickell,* 292 U.S. 415 (1934); *Moore, Federal Practice* § 0.205, Note 33 (2d ed. 1948); and 1 *Barron & Holtzoff, Federal Practice and Procedure* § 52, p. 287 (1960).

STATUTE INVOLVED

The validity of *Chapter 9, Title 67 of the Tennessee Code Annotated* is challenged by Appellants. A copy of the pertinent provisions of this chapter is attached hereto as Appendix III.

QUESTIONS PRESENTED

1. Whether the failure of the Tennessee tax officials to assess property for ad valorem taxes on a uniform standard of valuation by the systematic, intentional and long-standing practice of over-valuation of the

property of Appellants and others who are centrally assessed by the Public Service Commission of Tennessee, while at the same time systematically undervaluing the property of persons assessed locally and not centrally by the Public Service Commission of Tennessee, but who are similarly situated under the laws and Constitution of Tennessee which require that *all* persons who own property in Tennessee be taxed in an equal and uniform manner with no species of property taxed any higher than any other species of property, constitutes such long-standing discrimination that Appellants are denied "Equal Protection under the Law" as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by *Title 28, Section 1343 of the United States Code,* and whether, under said section of the *United States Code,* jurisdiction over the instant case is properly invoked in a United States Federal District Court.

2. Whether the requirement contained in *Tennessee Code Annotated 67-906 B(2),* that irregular-route motor carriers shall report the number of vehicle miles operated in each county, municipality or taxing district in Tennessee, enforced through regulations of the Defendant State of Tennessee Public Service Commission, imposed upon Appellants such an impossible task, and one where compliance is so expensive, causes such great delays, and creates such dangerous highway hazards as to render said provision void under Article I, Section 8 of the Constitution of the United States, and whether said section has severely hindered the efforts of Appellants to fulfill their duties and obligations to render speedy, efficient, economical service as required by the *Interstate Commerce Act of 1940,* 54 Stat. 899 (1940), and whether said section of

the *Tennessee Code Annotated* is in such conflict with the *Interstate Commerce Act,* so as to render it void under the Supremacy Clause, Article V1, Clause 2, of the Constitution of the United States, and is in such conflict with the *Interstate Commerce Act* that the jurisdiction of a United States Federal Court is properly invoked in the instant case by virtue of *Title 28, Section 1337 of the United States Code.*

3. Whether in addition to those sections of the *United States Code* which confer jurisdiction on a Federal District Court without a showing of "jurisdictional amount", the amount in controversy in the instant case meets the federal jurisdictional requirement of the $10,000 "value" of the "matter in controversy."

A. Whether the $10,000 "amount in controversy" is present in the instant case by reason of the fact that a sum greatly in excess of this amount has accrued against many of the Appellants under *Tennessee Code Annotated 67-913* which states that an irregular-route carrier such as Appellants "shall . . . be liable to a penalty of one hundred dollars ($100.00) for each and every day which such owner is delinquent in filing" the mileage information required by *Tennessee Code Annotated 67-906 B(2).*

B. Whether the cost incurred by Appellants in complying with *Tennessee Code Annotated 67-906 B(2)* is in excess of, and should be included in computing for jurisdictional purposes, the "value" of the "matter in controversy" in the instant case.

C. Whether in computing the "value" of the "matter in controversy" an individual Appellant can aggregate the ad valorem taxes it owes to all the

counties and municipalities of Tennessee by reason of the fact that said taxes are assessed centrally by the Public Service Commission of Tennessee and State Board of Equalization, and whether or not there has been such a long-standing, systematic and intentional discrimination practiced by Defendants against the property interests of Appellants, so that a "conspiracy of action" must be implied which entitles each individual Appellant to aggregate all the taxes owed by him to the respective counties and municipalities of Tennessee in computing "amount in controversy" for purposes of federal jurisdiction.

4. Whether the three-judge Federal District Court abused its discretion in disregarding and dismissing as unreasonable on its face the allegations contained in the uncontradicted and verified Bill of Complaint as amended, and Affidavits of Appellants concerning the reporting requirements of *Tennessee Code Annotated 67-906 B(2)*.

5. Whether the Federal District Court abused its discretion in granting the Defendants' Motions to Dismiss as to the Plaintiff, Commercial Carrier Corporation, under the venue Statute 28 *United States Code* Section 1391.

6. Whether *Chapter 9 of Title 67, Tennessee Code Annotated* (and particularly Sections 67-901, 67-906 B(2), 67-913, 67-920 B(2), 67-931) is in violation of the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the United States Constitution by reason of the fact that it permits a county (95 in Tennessee), municipality (several hundred), or taxing district (innumerable) to levy and collect ad valorem taxes upon personal property of a non-resident of

Tennessee although the personal property of the non-resident has acquired no actual tax situs therein by being regularly and habitually within said county, municipality or taxing district, or regularly and habitually in the State of Tennessee.

7. Whether *Chapter 9 of Title 67, Tennessee Code Annotated* is in violation of Article I, Section 8 of the Constitution of the United States in creating an undue burden on interstate commerce by reason of the fact that said statute results in Appellants being subjected to "multiple taxation"; i.e., taxation totalling more than 100% of the value of their rolling stock, due to the fact that Appellants' states of domicile have not, and are not, required under the laws and Constitution of the United States to recognize or give credit for ad valorem taxes paid by Appellants in the State of Tennessee as the taxes and assessments in Tennessee are based purely on a fictional or statutory situs and not on an actual situs resulting from Appellants' property being regularly or habitually in the State of Tennessee.

8. Whether the method of assessing ad valorem taxes in Tennessee results in a discriminatory and higher assessment being imposed on motor vehicles operating in interstate commerce, such as Appellants, as opposed to motor vehicles operating in intrastate commerce within the borders of Tennessee, creates an undue burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the Constitution of the United States.

9. Whether the three-judge United States Federal Court abused its discretion in denying Appellants' Motions for a Temporary Restraining Order and a

Preliminary Injunction by reason of the fact that Appellants' verified Bill of Complaint, as amended, and Affidavits, demonstrate a reasonable probability of the presence of a substantial federal question, and of irreparable damage to the Appellants if it is not granted, as well as a reasonable probability that federal jurisdiction is either present under a section of the *United States Code* that does not require the showing of a jurisdictional minimum, or if under a section where jurisdictional minimum is required, that there is a reasonable probability that such amount is present as to each of Appellants.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The jurisdictional questions presented by this appeal are of substantial national importance in their bearing on the function of federal courts. This importance is magnified by the fact that the substantive merits of the case contain extremely important questions of constitutional law in regard to the state taxation of vehicles engaged in interstate commerce and the free flow of said commerce among the states.

The Appellants alleged in their Bill and supported with Affidavits the fact that *T.C.A.* 67-901-931 has been invidiously, intentionally, and over a long period, systematically applied against them, by Defendants, in a discriminatory manner. Defendants have not denied this discriminatory practice, and the lower court held that said practice not only exists but also that it raises a substantial federal question under the "Equal Protection Clause" of the Fourteenth Amendment to the Constitution of the United States. Solely on this ground, and without considering the other constitutional attacks on the Tennessee statute raised

in Appellants' Bill of Complaint, it is a flaunting of national policy for a federal court to refuse to exercise its jurisdiction. *The lower court's decision not to exercise jurisdiction, coupled with its correct holding that the state courts of Tennessee do not provide an adequate remedy to redress this discrimination, results in a situation that leaves Appellants no forum in which to seek relief from an admittedly discriminatory tax.* If the lower court's refusal to accept jurisdiction is allowed to stand, it will leave Tennessee and other states free to tax interstate commerce in a discriminatory manner. The only restriction on this practice, based on the opinion below, is the limit of a respective state's ingenuity in manipulating the form in which the discriminatory taxes are collected. In the State of Tennessee, for example, many of Appellants have a tax liability considerably higher than $10,000. (See Plaintiffs' Exhibit H, attached hereto as Appendix IV.) However, because of the manner in which it is distributed among the 95 counties and innumerable municipalities in Tennessee, Appellants have been denied redress in the United States Federal Courts.

One of the principal reasons for the formation of the federal government, as expressed in Article 1, Clause 8 of the Constitution of the United States, and in Congressional legislation, is to insure that interstate commerce is not unduly burdened by discriminatory taxes or otherwise. Congress has created and empowered the federal courts with jurisdiction to provide a forum for the redress of any infringement of this purpose. In the instant case, not only is an unconstitutional restriction on the free flow of interstate commerce presented, but also the District Court has

concluded that no adequate, legal remedy exists for Appellants in the state courts. In such a situation, it is the obligation of a federal court to exercise its jurisdiction. Thus, the issue presented in this appeal, which is of vital national importance, is the measure of protection to be afforded by the federal courts in preserving the national transportation policy from discriminatory and unconstitutional state taxation.

STATEMENT OF CASE

Chapter 9, Title 67, T.C.A. provides for the assessment of utilities and transportation carriers by the Tennessee Public Service Commission, and the distribution of such assessments to various counties, municipalities, and taxing districts for local taxation. It provides that irregular-route motor carriers, by virtue of even the slightest operation in the state of Tennessee, will be deemed to have a taxing situs for ad valorem purposes within the state of Tennessee. Such Chapter also provides that the Commission is to compute ad valorem assessments based on a complex formula which takes into account the total revenue of such carrier, its total capital, its net operating revenue, and its mileage operated in each of the Tennessee counties, municipalities, or taxing districts. The local subdivisions apply their own particular tax rate both as to the assessments certified to them by the Commission, and to property which is permanently located within their jurisdictions and which they assess locally. The Tennessee State Board of Equalization has the duty of equalizing the assessments so that the property that is assessed by the Tennessee Public Service Commission and the property assessed locally by the subdivisions are both assessed at exactly the

same rate. As Appellants are all non-residents of Tennessee, they have no property located permanently in Tennessee (with the exception of several of the carriers who own negligible amounts of property within the State); consequently, all of their property is assessed centrally by the State Public Service Commission.

It will be noted from Appendix III that under *T.C.A.* 67-906 B(2) all irregular-route motor carriers are required to report bi-annually the number of miles operated in or through Tennessee, and also ". . . the number of vehicle miles operated during the prior calendar year within, into and/or through each county, incorporated municipality or taxing district . . ."; and that *T.C.A.* 67-913 provides that any carrier who fails to make the required report shall be deemed to have waived the mode and manner of the assessment and the distribution thereof, and further be subjected to a penalty of $100.00 per day for its delinquency. Under this section, when the Commission is not furnished the mileage in the various counties, municipalities, and taxing districts, it may arbitrarily distribute the total assessment to any of the counties, municipalities or taxing districts of the state. In addition, this section also provides that failure to comply with its requirements results in forfeiture of the right to protest the amount of assessments.

The Appellants are twenty-seven non-residents of Tennessee, irregular-route motor carriers, engaged exclusively in interstate commerce. The Tennessee Public Service Commission assesses Appellants' property bi-annually, in the odd years, by sending them forms on which must be listed considerable financial data concerning their corporations and the miles

operated in Tennessee broken down by counties, municipalities, and taxing districts. On even years, the Commission assesses Appellants by sending them Supplemental Ad Valorem Assessment Reports on which Appellants are required to list all property which they have acquired since the preceding odd-year assessment. This supplemental report is required to be filed by the Appellants no later than April 1 in a given even year. Appellants instituted this suit on the first court day, April 4, 1966 (a Monday) following said date of April 1, 1966 (a Friday), in the Federal District Court, Middle District of Tennessee, against the Tennessee Public Service Commission, the State Board of Equalization, and all of the counties and municipalities of Tennessee, requesting, among other things, a temporary injunction against the distribution of the 1966 even-year Supplemental Assessments by the Public Service Commission. (The counties and municipalities were sued as "class defendants" as provided for under Rule 23 of the *Federal Rules of Procedure,* and six of the largest counties and municipalities were named as representatives for the class).

The principal facts and arguments on which Appellants rely, both as to the substantiality of the federal questions and the presence of federal jurisdiction, can be divided into three basic categories. The first pertains to the fact that through *T.C.A.* 67-901-931 the State of Tennessee authorizes its counties and municipalities to tax non-resident irregular-route carriers by motor vehicle, such as Appellants, on the basis of a fictional situs, which has no relation to regular or habitual use of, or presence on, the roads in Tennessee. Appellants contend that this fictional situs is unconstitutional in two separate respects. One, it violates

the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that Appellants do not have a sufficient connection with the State of Tennessee to justify a taxing nexus or situs therein.[1] Second, the *Tennessee Code* section in question violates the Commerce Clause, Article 1, Section 8 of the Constitution of the United States in that it subjects Appellants to prohibitive administrative expense by compelling them to pay ad valorem taxes in the various states through which they may have occasion to operate, and in addition, subjects Appellants' property to "double or multiple taxation", unduly burdening the free flow of interstate commerce.[2]

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[1] See *Central Railroad Co.* v. *Commonwealth of Pa.*, 370 U.S. 607 (1962), for summary and synthesis of this Court's decisions on state ad valorem taxation of moving equipment engaged in interstate commerce; especially at page 370 U.S. 614, 615 and 616, where it is clearly stated that an irregular-route carrier can never be subjected to ad valorem taxes in a non-domiciliary state unless the non-domiciliary state can demonstrate an habitual employment of the carrier's property within its jurisdiction. See also *Commercial Carriers, Inc.* v. *Kentucky Tax Comm'n.*, 321 S.W. 2d 42 (1959), where the Kentucky Court of Appeals held that a nearly identical statute to *T.C.A.* 67-901-931 was unconstitutional as applied to an irregular-route motor carrier.

[2] The multiple taxation results from the fact that Appellants' states of domicile tax for ad valorem purposes 100% of Appellants' property, including Appellants' rolling stock which on occasion may pass through and be taxed in Tennessee. The states of domicile do not, and are not, required to give a credit for the additional ad valorem taxes paid to states such as Tennessee which base their taxing situs on a purely legislative or fictional basis and not on an actual situs resulting from habitual employment of property within the jurisdiction. See Plaintiffs' Exhibit G, attached hereto as Appendix V. See also *Central Railroad Co.* v. *Commonwealth of Pa.*, *id.*, and *N.Y. Central Railroad* v. *Miller*, 202 U.S. 584, 597 (1906).

The second area upon which Appellants attack the Tennessee statute in question is that area of problems created by *T.C.A.* 67-906 B(2). This section requires irregular-route carriers, such as Appellants, to report the total number of vehicle miles operated each year in Tennessee, broken down into counties, municipalities, and taxing districts. Appellants have alleged in their Bill of Complaint and submitted affidavits to the effect that the Tennessee Public Service Commission insisted upon literal compliance with the reporting requirement of the section, and that in complying with said requirements, they have been compelled not only to spend sums of money each year exceeding the amount of the taxes levied for the year, but also that they have been compelled to disregard normal safety precautions prescribed in the *Interstate Commerce Act*. *T.C.A.* 67-906 B(2) violates the Commerce Clause, Article 1, Section 8 of the Constitution of the United States in unduly burdening an interstate carrier with exorbitant "bookkeeping costs", and the Supremacy Clause of the federal constitution by conflicting with Congressional regulation of interstate commerce.

The third category of facts relied on by Appellants concerns the discriminatory manner in which *T.C.A.* 67-901-931 is applied. Appellants alleged in their Bill, and submitted affidavits and exhibits to the effect that their property has been systematically, intentionally, and for a long period, assessed by the Defendants at actual value, i.e., on 100% of its value, while Defendants have at the same time systematically assessed other property in Tennessee at a maximum of 50% of its value, and, in most instances, at a much lower percentage. Defendants have not denied the above allegations and the District Court held that the above

discriminatory ratios did in fact exist and that this discrimination practiced against Appellants violated the Constitution of Tennessee which requires all property to be assessed equally for ad valorem purposes and raised under the Equal Protection Clause to the Fourteenth Amendment of the Constitution of the United States a substantial federal question.

Defendants Have Denied Appellants Equal Treatment and Protection Under the Law as Required by 28 U.S.C. Section 1343(3) and the Fourteenth Amendment to the Constitution of the United States. Consequently, Federal Jurisdiction Is Proper in the Instant Case Without Regard to the Value of the Matter in Controversy

Title 28 *U.S.C.* Section 1343(3), provides that the federal district courts shall have original jurisdiction of any civil action:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . .

The central error in the decision below as to jurisdiction under this section lies in the following statement in the Court's opinion:

> (Appendix I, p. 8) A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically. Where plaintiffs' remedies are of the sort classically associated with tax actions and the claims are of a property nature, a Federal court should not accept jurisdiction solely on this basis.

It is true that the courts have held that artful pleading or mere allegations of discrimination in a bill of com-

plaint are insufficient to raise Section 1343 jurisdiction. However, Appellants have gone much further than mere allegations, and the lower court's statement in this regard is inconsistent with its holding that "the question of equal protection raised by plaintiff's assertions that utility property is systematically assessed on the basis of higher assessments than non-utility property, in violation of the state constitution, . . . presents a federal question within the terms of 28 *U.S.C.A.* 1331." (Appendix I, p. 6). The fact that the discrimination demonstrated by Appellants not only raises a federal question but *definitely* results in a Fourteenth Amendment Equal Protection violation is established in the 1966 case of *Louisville & Nashville R. Co.* v. *Public Serv. Comm'n of Tenn.*, 249 F. Supp. 894 (M.D. Tenn. 1966) which held that the *identical* discrepancy in assessment ratios demonstrated in the instant case violated the Equal Protection Clause of the Fourteenth Amendment. The courts have repeatedly held that if a complainant demonstrates that as a result of a state law or the application of a state law, he is discriminated against in a manner that raises a substantial federal question under the "Equal Protection Clause" of the Fourteenth Amendment to the United States Constitution, then the jurisdiction of a United States Federal Court is properly invoked under the *Civil Rights Act* regardless of the "value" of the "matter in controversy" and regardless of whether or not the interest the complainant seeks to protect from discrimination is a personal one or one involving his property and measurable through pecuniary valuation.

The District Court in the instant case confused the distinction that is made by the courts in situations

where "due process" or "privilege and immunities" violations are demonstrated as opposed to instances where an "equal protection" violation is present. As to the former (see *Hague* v. *C.I.O.*, 307 U.S. 496 (1939)), this Court has held that Section 1343 jurisdiction cannot be invoked when state action threatens a property right, that is, a right measurable in monetary value. Concerning the latter, however, this Court has held that as a violation of the "Equal Protection Clause" inherently involves the right to be treated equally with some other *person,* the monetary or property basis which underlies the unequal treatment is irrelevant. That is, as unequal treatment always involves the personal right to be treated equally with the other members of your class, the question as to whether the unequal treatment results from discrimination under a taxing statute or under a public accommodations law is unimportant, and the violation of the personal right to equal treatment always raises *Civil Rights Act* jurisdiction. (*Snowden* v. *Hughes,* 321 U.S. 1 (1944)).

The District Court in rejecting *Civil Rights Act* jurisdiction relied entirely on the two lower court cases of *Detroit Edison Co.* v. *East China Township School District,* 247 F. Supp. 296, 303 (E.D. Mich. 1965), and *Olan Mills, Inc., of Tennessee* v. *Opelika, Alabama,* 207 F. Supp. 332, 336 (M.D. Ala. 1962), neither of which has applicability in the instant case. The important element missing in these cases was a showing of an "equal protection" violation. In these cases the allegations concerning equal protection or the plaintiff's averments as to discrimination were summarily dismissed *before* Section 1343 jurisdiction was discussed.

The most significant case to rule on the applicability of federal jurisdiction through combining a Fourteenth Amendment "equal protection" violation with Section 1343 is the United States Supreme Court case of *Snowden* v. *Hughes* (*supra*, p. 18). This case was cited and discussed at considerable length below, both by Appellants and Appellees; however, it, along with other decisions of this Court on the subject were completely ignored and not even referred to by the District Court. In *Snowden*, there was no allegation of jurisdictional amount by complainant, the *Civil Rights Act* was the only possibility for federal jurisdiction, and the Court at no time in the opinion departed from the question of jurisdiction under the *Civil Rights Act*. *The entire opinion is a study in exactly under what situations involving a Fourteenth Amendment violation this Court is and is not going to permit jurisdiction under Section 1343; and more particularly what constitutes an "equal protection" violation that will invoke jurisdiction under Section 1343.* The Court explained the circumstances under which an "equal protection" violation comes within the purview of the Fourteenth Amendment and Section 1343 by setting out in great detail examples of situations and cases where state action resulted in a violation of the personal right to be treated equally with persons similarly situated.[3] It is the example given by the Court, set

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[3] *Snowden* v. *Hughes* (*supra*, p. 18, at p. 321 U.S. 9): *"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic*

out in Footnote 3 herein, which has particular application to the instant case. Indeed, an examination of the ten cases cited in support of this example reveals that ninety percent dealt with factual situations so similar to that of our present case that they are indistinguishable. In nearly all of these cases, as in the instant case, tax officials were required by state law to tax on a uniform standard. The intentional, systematic, long-standing practice of consistent under-valuation of the property of some taxpayers and systematic over-valuation of the property of others was held in these cases and has always been held by this Court to result in a denial of a person's civil rights to be treated equally under the law. In the *Snowden* case, the Court concluded that "it was not intended by the Fourteenth Amendment and the *Civil Rights Act* that all matters formerly within the exclusive cognizance of the states should become matters of national concern," and that jurisdiction should be denied where "accidental" as opposed to "purposeful" discrimination was present. (*Snowden* v. *Hughes, supra,* p. 18, at p. 321 U.S. 11). The example and the

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under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. Coulter v. *Louisville & N. R. Co.*, 196 U.S. 599, 607, 609, 610; *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 353; *Southern R. Co.* v. *Watts*, 260 U.S. 519, 526. [Footnote included as follows:] See also *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 447; *Bohler* v. *Calloway*, 267 U.S. 479, 489; *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25, 28; *Great Northern Ry. Co.* v. *Weeks*, 297 U.S. 135, 139." (emphasis added)

cases cited by the Court leave no doubt, however, that if the Court had had the facts of the instant case before it, the element of "purposeful discrimination" would definitely have been demonstrated and jurisdiction upheld under the *Civil Rights Act.* The "intentional" or "purposeful" aspect of the discrimination in the instant case was ruled on specifically in the previously cited case of *Louisville & Nashville R. Co.* v. *Public Serv. Comm'n. of Tenn., supra,* p. 17, where the Federal District Court for Tennessee had before it the requisite $10,000 jurisdictional amount, and held in deciding on the merits of the Fourteenth Amendment question raised herein that the discrepancy in ad valorem assessment ratios practiced in Tennessee against interstate carriers was "clearly invidious discrimination which is systematic, *intentional,* and of long-standing" (at p. 249 F. Supp. 898 (emphasis supplied); see also the cases set out in Footnote 3 herein where the long-standing practice of over-valuing the property of some taxpayers while under-valuing the property of others similarly situated has consistently been held by this Court as "purposeful discrimination".)

The requirement of "intentional" discrimination imposed in Section 1343 "Equal Protection Cases", greatly restricts the number of cases that come within *Civil Rights Act* jurisdiction and eliminates any danger of the federal courts being deluged by such cases. In the tax area, for example, ninety-nine percent of the constitutional attacks on state taxing statutes are on "due process" or "privileges and immunities" grounds, and it is the extremely rare case that raises a substantial federal question on "equal protection" grounds. The instant case presents one

of those unusual circumstances in which a taxpayer is able to demonstrate that a taxing statute is discriminatorily applied in such a way that he is not treated equally with other persons in his taxing class.

The only lower court ever to deal with the exact situation presented in the instant case; i.e., where an equal protection violation *definitely* was demonstrated as a result of discrimination in the application of a taxing statute, had no difficulty in invoking *Civil Rights Act* jurisdiction. (See *Schlosser* v. *Welsch,* 5 F. Supp. 933, 996, 997 (D. S.D. 1934), which dealt with a state taxing statute, valid on its face, but administered by officials in such a manner as to discriminate against certain members of a class who by state law were required to be treated in the same way as the other members of the class. Also see the United States Supreme Court cases cited in the *Schlosser* case at p. 5 F. Supp. 997) . The *Schlosser* case was recently cited with approval by the 1962 case of *Abernathy* v. *Carpenter,* (208 F. Supp. 793 (D. Mo.)) where the Court, in summarizing and approving the *Schlosser* case, stated (at p. 208 F. Supp. 795) that the "arbitrary exclusion of a person rightfully belonging to a class of persons," for purposes of taxation, is a denial of "equal protection" and "undoubtedly" within the intent of the *Civil Rights Act.* The class to which Appellants logically, and legally belong, and from which they have been arbitrarily excluded is that class which under the Constitution and laws of Tennessee is composed of *all* the persons owning property in Tennessee. (See Appendix VI). The basis for jurisdiction in the instant case rests on the personal right of Appellants to be treated equally, as required by

the laws and Constitution of Tennessee, with other persons who are in the same class as themselves, and, as brought out in *Snowden, Schlosser,* and *Abernathy,* the fact that the underlying basis of the unequal treatment is a tax is irrelevant. (For other cases invoking Section 1343 jurisdiction in situations where an equal protection violation involved a discriminatory treatment of a corporation's or person's property, see *Hornsby* v. *Allen,* 326 F. 2d 605 (5th Cir. 1964); *Cobb* v. *City of Malden,* 202 F. 2d 701 (1st Cir. 1953); *McCoy* v. *Providence Journal Company,* 190 F. 2d 760 (1st Cir. 1951); *Watchtower Bible and Tract Soc.* v. *Los Angeles County,* 181 F. 2d 739 (9th Cir. 1950); *Glicker* v. *Michigan Liquor Control Commission,* 160 F. 2d 96 (6th Cir. 1947); *Burt* v. *City of New York,* 156 F. 2d 791 (2d Cir. 1946).

Through the Enforcement of Burdensome Regulations, Defendant Public Service Commission Has Unduly Burdened the Free Flow of Interstate Commerce in Violation of the Commerce Clause of the United States Constitution, and Has Severely Hindered the Efforts of Appellants to Fulfill Their Duties and Obligations Under the Interstate Commerce Act. Defendants, Acting in Concert, Have Also Violated the Provisions of Said Act and the United States Constitution by Intentionally Assessing Appellants' Property in a Discriminatory Manner[4]

The Restraints Imposed by Defendants on Appellants Violate Congressional Regulation of Interstate Commerce as Expressed by Congress in the Interstate Commerce Act. Consequently, Jurisdiction in the Instant Case Is Authorized Under 28 U.S.C. Section 1337

Title 28 *U.S.C.* Section 1337, reads:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any

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[4] The duties and obligations imposed by Congress on a common carrier are set out in the *Interstate Commerce Act* under the heading "National Transportation Policy" as follows: (Act of September 18, 1940, C. 722, Title 1, Section 1, 54 Stat. 899, 49 *U.S.C.* note preceding Section 1). "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act; to promote *safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers* . . . encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . .—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act* (chapters 1, 8, 12, 13 and 19 of this title) *shall be administered and enforced with a view to carrying out the above declaration of policy.*" (emphasis added). See *Order of Railroad Teleg.* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 352 (1960), for general policy interpretation given by the courts to this section of the Act.

Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The United States Congress considers cases which fall under Section 1337 jurisdiction to be of such significant national importanee that there is no requirement under this section that a complainant demonstrate any "amount in controversy" in order to invoke federal jurisdiction.

The issue as to whether *Tennessee Code Annotated* 67-906 B(2) is in violation of the Commerce Clause of the Constitution of the United States or whether said section is in conflict with the *Interstate Commerce Act,* thereby sustaining federal jurisdiction under Title 28 *U.S.C.* Section 1337, turns on the interpretation given to the allegations set forth in Appellants' Bill of Complaint; i.e., whether the District Court in ruling on Appellants' Motion for a Preliminary Injunction abused its discretion and erred in disregarding and dismissing as unreasonable the uncontradicted allegations in the verified Bill of Complaint and Affidavits filed by Appellants. It is well established that a properly verified Bill of Complaint is sufficient to support a Motion for Preliminary Injunction; and that well-pleaded allegations of a Bill and affidavits and exhibits attached thereto, to the extent that they have not been denied under affidavit by defendants, are accepted as true for the purpose of deciding an application for Preliminary Injunction. Moreover, on a Motion for Preliminary Injunction, a plaintiff need only demonstrate a "reasonable probability" rather than a "certainty" that he will ultimately prevail on a given issue.

The following uncontradicted allegations of fact appear in Appellants' Bill:

(1) They are "forced to have drivers stop their vehicles along roads that are often quite narrow and completely dark in order to search for road markers and signs that indicate where a county or municipality begins or ends"; (2) "There is no way to obtain this information from road maps . . . and absolutely no way to obtain said information except by having a report made from personal observation of signposts on the roads"; (3) Appellants are irregular-route carriers whose tractor-trailers and trucks "do not travel on fixed routes or schedules but make trips, dependent in each case, upon specific contracts between them and their customers"; (4) "The 'Commission' had insisted upon literal compliance with the said filing requirement of *Tennessee Code Annotated* 67-906 B(2), and its insistence has resulted in some of the Appellants expending a tremendous amount of time, effort and money in reporting in their ad valorem Assessment Reports the total miles operated in Tennessee by counties and municipalities" . . . and this expenditure is "grossly out of proportion to any conceivable benefits received from Tennessee." (As to the fact that the cost of compliance is often higher than the taxes involved, see Plaintiffs' Exhibit F, attached hereto as Appendix VII).

As to the safety violations inherent in the regulations imposed by Section 67-906 B(2) *T.C.A.*, the following facts stated in the Bill of Complaint must be accepted as true:

(At pages 23 and 24 of Petitioners' Bill of Complaint)

The Petitioners allege that in complying with *T.C.A.* 67-906 B(2) they have been forced to

violate a number of this Commission's safety regulations applying to stopped vehicles. Petitioners' drivers would be forced to spend at least forty-five minutes each and every time they stopped a vehicle along the roadside, if they were to comply with all the safety requirements of the Commission. (See *Code of Federal Regulations,* Title 49, Section 192.20-192.26, Subpart C, as to the requirements for setting out flares, lanterns, reflectors, *et cetera,* when a vehicle is stopped along a highway).

The District Court, without ruling on whether or not these facts were sufficient to invoke Section 1337 jurisdiction, held, in effect, that the reporting burden on Appellants was of their own making; that is, the Court stated that the statute in question "makes no provision as to how [the reporting] should be accomplished", that "the controlling factor is not the conduct or action of the plaintiffs but the requirements or exactions of the defendants imposed in compliance with the statute", and that "the method of compliance allegedly chosen by plaintiffs cannot be deemed a result of the challenge statute unless it is demonstrated that this method is the only practical way that the required reporting may be accomplished." (Appendix I, at pp. 4, 5).

The key to whether or not Appellants' methods are "the only practical ones" rests on whether or not it is impossible, as Appellants allege, to comply with the recording requirements through the use of maps. If they are correct concerning the lack of adequate maps, then it is obvious that the method they have chosen is the only practical one for filling out the mileage forms sent to them by the Tennessee Public Service Commission. Defendants have not denied under veri-

fied affidavit Appellants' allegations as to the unavailability of maps from which Appellants could garner the required information. The District Court did not mention either the name of, or the existence of, such maps, and only stated that Appellants' allegations are "unreasonable on its face since in normal travel it must be presumed that motor carriers use established routes and do not travel at random." This statement of the Court does not cover or attempt to answer Appellants' allegations as to the fact that the maps of Tennessee do not sufficiently mark the boundary lines of the local jurisdictions to enable Appellants to supply a breakdown of their mileage traveled in the taxing districts, counties, and municipalities of Tennessee. In addition, Appellants are, of course, not regular-route carriers, but irregular-route carriers, who, by definition, and as stated in their Bill, are carriers that do not use established routes or maintain regularly scheduled trips through Tennessee. (See Appendix III, at p. 13, for definition of irregular-route carrier in *T.C.A.* 67-901). It is important to note in regard to the reasonableness of Appellants' allegations that two Tennessee state courts have examined an attack by irregular-route motor carriers on the reporting requirements of *T.C.A.* 67-906 B(2), and in both decisions it was held that compliance with said requirements would be an impossibility. (See, for example, *Aero Mayflower Transport Company et al.* v. *Cayce Pentecost et al.*, in the Chancery Court, Part I at Nashville, No. 81411). The carriers in the *Mayflower* case found it so difficult to comply with the reporting requirements of *T.C.A.* 67-906 B(2) that they were unable to supply the Commission with the required information and thus the

state courts held that these carriers were in no position to complain that they had been unduly burdened or that the Commission had demanded strict compliance with the requirements. Assuming, *arguendo,* that the Tennessee state courts were correct in their analysis that an unconstitutional statute can be made constitutional by lax enforcement of state officials, the situation in the instant case presents an entirely different situation as to those Appellants who, at great expense, have supplied the required information. They have done so in accordance with the instructions, forms, and letters sent to them bi-annually from 1957 to the present by the Tennessee Public Service Commission. The forms sent out by the Public Service Commission to the Appellants not only include threats of penalties if the forms are not filled in *completely,* but also the forms are accompanied each year by a letter which reiterates that penalties will be exacted if the forms are not completed as designated. Defendants have not denied that these forms and letters were sent bi-annually in odd years, including 1965, to Appellants, or that many of the Appellants have literally complied with these forms and the requirements of *T.C.A.* 67-906 B(2).

The burdensome reporting requirements of *T.C.A.* 67-906 B(2) not only make it impossible for Appellants to provide the "economical", "adequate", and "sufficient" service, but also the "safe" operations required by the *Interstate Commerce Act.* (See Fn. 4 herein). In addition, it is also clear that the discriminatory taxing practice of Defendants, already described herein, has a substantial adverse economic effect upon the operations of Appellants and thus conflicts with the "National Transportation Policy of Congress" as

expressed in the *Interstate Commerce Act,* and the Commerce Clause of the Constitution of the United States. While this discriminatory taxing practice of itself is a sufficient restraint on Congressional regulation of interstate commerce to invoke Section 1337 jurisdiction, and while this point was raised below, the lower court does not even mention this ground for jurisdiction in its opinion.

The law concerning Section 1337 jurisdiction and the *National Transportation Policy* (49 *U.S.C.* Section 1) was clearly and succinctly set out in a recent case that presented an analogous situation to that of the instant case:

> (*Brotherhood of Rail. Train.* v. *New York Cent. R. Co.,* 246 F. 2d 114, at p. 120, (6th Cir. 1957).
>
> In the prevailing opinion of the court in *Toledo P. & W. R.R.* v. *Brotherhood of Railroad Trainmen,* the Court of Appeals, speaking through Judge Lindley, after commenting on the provisions of the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq., went on to say that *"From these provisions and others, it is clear that a carrier in interstate commerce is bound, not only to furnish carrying facilities for anyone desiring them, but to supply 'necessary, proper, adequate and safe' facilities."* The court stated that, because of the activities of members of the union, the plaintiff was rendered unable to furnish such facilities and was delayed and prevented from operating. *"Congress," said the court, "has seen fit to impose certain duties upon a common carrier engaged in interstate commerce, and the failure to perform such duties subjects the carrier to liability. It can not be that Congress imposed duties, and yet intended that the carrier should be denied federal relief from interference with carrying out such duties."* (Emphasis added).

(See also *Erie R.R. Co.* v. *Local 1286, International Longshoremen's Ass'n,* 117 F. Supp. 157, 159 (W.D. N.Y. 1953). The national importance of Section 1337-type cases was discussed in the 1953 *Columbia Law Review* (at pp. 157-196—See especially pp. 195-196) in an article by Paul T. Mishkin. Professor Mishkin, in addition to stating the obvious fact that interstate carriers are often in need of a federal forum in order to protect them from the local pressures and influences often present in the state courts, also points out that federal jurisdiction is necessary to safeguard congressional legislative programs. In interstate commerce, the national concern and policy are first established by congressional action. The balancing of competing values is not left to the courts, but is declared at least generally by Congress. *The protective forum in such circumstances is then principally a shield for federal legislation, and must of necessity be decided by federal courts.*

Accrued Penalties Must Be Added to the Cost of Compliance With Section 67-906 B(2) T.C.A., and to the Tax Liabilities Due by Appellants, in Arriving at the "Value" of the "Amount in Controversy" for Purposes of Invoking Federal Jurisdiction

The Ten Thousand Dollar "Amount in Controversy" Generally Applicable to Federal Jurisdiction Is Present in the Instant Case, Since a Sum Greatly in Excess of This Amount Has Already Accrued Against Appellants Under the Penalty Provisions of Section 67-913 T.C.A.

Apart from the various grounds set out herein which establish federal jurisdiction without regard to the "value" of a "matter in controversy", jurisdiction is also proper under those sections of the *United States Code* which require a $10,000 minimum "amount in controversy". As the Appellants have set forth

multiple and varied grounds as a basis for relief, the "matter in controversy" must be defined in terms of each of these grounds.

The District Court, without citing any case or textual authority for its conclusion, refused to consider as a part of the "matter in controversy" the accrued liabilities for penalties owed by Appellants under *T.C.A.* 67-913:

> (Appendix I, at p. 3) These penalties are not automatic, being enforceable only upon the request of the Public Service Commission. Tenn. Code Ann. Section 67-914 . . . In our view the possibility that such penalties may be invoked is of such speculative nature insofar as the actual controversy between the parties is concerned that it will not support an action in which jurisdictional amount is required.

T.C.A. 67-914 provides a means of *collection* of the penalties through suit by the Attorney General of Tennessee; *however, under T.C.A. 67-913 a $100 a day penalty has automatically accrued against those Appellants who have not filed the mileage information required by T.C.A. 67-906 B(2).* The question as to whether an accrued penalty liability is automatically enforceable or is enforceable at someone's discretion has never been considered by the courts as relevant in determining jurisdictional amount.

Healy v. *Retta* (292 U.S. 263, 268 (1934) sets out the accepted rule that, in situations such as in the instant case, where payment of a tax "does not avoid the penalty and end the dispute", the penalties are includable in computing jurisdictional amount. See also *M & M Transfer Co.* v. *City of New York,* 186 F. 2d 157 (2nd Cir. 1950).

The Courts of the United States Have Consistently Held That the "Value" of "the Matter in Controversy" for Jurisdictional Purposes Includes the Cost of Complying With the Regulatory Aspect of a Statute. In the Instant Case the Cost Incurred By Appellants in Complying With Section 67-906 B(2) T.C.A. Is Far in Excess of the Ten Thousand Dollars Minimum Specified for Federal Jurisdiction

One measure of the "value" of the "matter in controversy" centers on Appellants' allegations as to the cost of complying with the regulatory reporting aspects of *T.C.A.* 67-906 B(2). The lower court incorrectly ruled that the regulations complained of "were incidental to the taxing aspect of the statute and the amount in controversy is therefore the value of the tax and not the cost of compliance." While the Court's statement may be true in general, it has no application where the cost of complying with a taxing statute requires more than the filling out of forms, and actually involves an expenditure greater than the revenue produced by the tax. (See Appendix VII).

The General Rule Against Permitting Aggregation of Separate and Distinct Claims Against Several Defendants for Purposes of Determining the "Value" of the "Matter in Controversy" Is Not Applicable in the Instant Case. The Practice By Defendants of Intentionally, Systematically, and for a Long Period of Discriminating Against the Interests of Appellants Results in a Fraudulent Conspiracy to Injure Appellants. In Situations in Which Defendants Have Acted in Concert to Conspire Against a Plaintiff, the Courts Have Consistently Invoked the Exception to the General Rule and Permitted a Plaintiff to Aggregate Separate and Distinct Claims. Thus, the "Value" of the "Matter in Controversy" for Each Appellant Includes the Total of All the Taxes Levied By the Counties and Municipalities of Tennessee Against Said Appellant, Treating Said Taxes as a Single Assessment or Judgment and Considering Said Counties and Municipalities as a Single Tribunal

The ad valorem taxes imposed on Appellants by the counties and municipalities of Tennessee are: (1) based on a *state* statute, (2) assessed centrally by the *state* Public Service Commission, and (3) required to be equalized by the *state* Board of Equalization. Despite this, the lower court treated the ad valorem taxes imposed on Appellants by the 95 counties in Tennessee and numerous municipalities as separate, distinct claims, and held that each Appellant could not aggregate the taxes it owed to these subdivisions for purposes of computing jurisdictional amount. The District Court, in refusing to aggregate the taxes Appellants owed the subdivisions, erred not only because these taxes are based on a single, state levied assessment, but also because of the constructive conspiracy or fraud which must be imputed to the Defendants for their long-standing, systematic, and intentional discrimination against Appellants' property. (See cases listed in Fn. 3 herein for rule that long-standing, systematic over-valuation in assessments has always

been held by this Court to raise a "constructive fraud"). The law has long been settled that where a constructive conspiracy among separate defendants is demonstrated, the plaintiff may aggregate separate claims against each of these defendants for purposes of computing jurisdictional amount.[5]

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[5] 54 *Am. Jur.*—U.S. Courts, Section 110 (at pp. 749, 750). "The foregoing rule against aggregating claims against defendants is not applicable where their liability is joint, or where concerted wrongful action or conspiracy forms the basis of the complaint against them . . . *Frequently the right or property for which protection is claimed is so inseparably related to the acts of several defendants that although there is no conspiracy, in the strictest sense, the combined effect of their acts is regarded, and the value in controversy viewed, from the standpoint of the complainant.*" (emphasis added)

In *Taylor* v. *Louisville & N. R.R. Co.* 88 F. 350, 374 (6th Cir. 1898), a case frequently cited by this Court), the Tennessee ad valorem taxing statute was construed and the question of joint responsibility for normally distinct liability was considered as follows: "*The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts*". . . . (emphasis added)

See also *Central Mexico Light and P. Co.* v. *Munch*, 116 F. 2d 85, (2d Cir. 1940, and cases cited therein).

The following facts demonstrate a concert of action on the part of Defendants: (1) The Constitution and laws of Tennessee demand uniform assessment of property for ad valorem purposes, yet there has existed for many years a long-standing discrepancy in assessment ratios between the counties and municipalities on the one hand and the state Public Service Commission on the other. (2) A three-judge court in the instant case held that this discrepancy in assessment ratios was approximately 50%; moreover, in the 1966 *L & N* case (at p. 249 F. Supp. 898), a 35% to 45% disparity in assessment ratios was characterized by the Federal District Court in Tennessee as "a clearly invidious discrimination which is systematic, *intentional,* and of long standing." (3) It has been alleged by Appellants in their Bill, and not denied by Defendants, that Defendants have been aware for many years of the discrimination in assessment ratios and that by their inaction and refusal to rectify same they have acted in concert to violate Appellants' constitutional rights. (4) The State Board of Equalization has had before it for many years the assessments of the counties and municipalities on the one hand, and those of the State Public Service Commission on the other, and year after year has refused to equalize same.

The logic and reason behind the rule which allows Appellants to aggregate the taxes it owes to the various subdivisions of Tennessee is well illustrated by the following: In its Motion to Dismiss, the Public Service Commission for the State of Tennessee states, among other things, that it should not be a party to the present litigation because its only action with respect to Appellants is to value their property at actual cash value and then send these valuations to the other Defend-

ants, all in accordance with the Constitution and laws of Tennessee. When considered in that light, that is, separate and independent from the actions of the other Defendants, there is no question as to the legality of the amount of the Commission's assessments. In like manner, Defendants Counties and Municipalities move for dismissal on the grounds that with regard to Appellants they simply receive the assessments sent to them by the State Public Service Commission and apply the same tax rate to these assessments as they do to locally assessed property. Again, if examined in this light, and without regard to the overall picture, the action of the counties and municipalities appears perfectly valid. It is only when the actions of the respective Defendants are viewed together that the discriminatory and fraudulent practice of taxing Appellants' property at valuations of 100% and local property on valuations of 50% is apparent. Indeed, if one were never to view such situations from the standpoint of the composite effect on plaintiffs, it would be impossible to ever have a legal remedy where the cause of action is based on a conspiracy. Consequently, where a concert of action is demonstrated, the courts have departed from the general rule against aggregating separate liability on the part of defendants and have tied together the separate actions of different defendants both from a substantive standpoint, which gives rise to a cause of action for conspiracy, and from a jurisdictional standpoint, which allows aggregation of separate claims against several defendants. (See Fn. 5 herein).

The Specially Convened District Court Abused Its Discretion in Granting the Defendants' Motion to Dismiss as to the Plaintiff, Commercial Carrier Corporation, Under the Venue Statute 28 United States Code § 1391

The District Court held that as to one of the Appellants, Commercial Carrier Corporation, the jurisdiction of a United States Federal Court was properly invoked by virtue of the presence of a substantial federal question and a tax liability of at least $10,000 owed by Commercial to the Defendant Shelby County. However, the Court dismissed this Appellant's cause of action on the basis that neither Commercial nor Shelby County resided in the Middle District of Tennessee and thus under the requirements of 28 *U.S.C.*, § 1391, this case could be dismissed for incorrect venue. In situations where incorrect venue is demonstrated, 28 *U.S.C.*, Section 1406 (a) gives a District Court discretion as to whether or not a case should be dismissed or transferred to the proper district. However, it is universally agreed that "dismissal will not usually be necessary, nor generally proper." "Dismissal of an action for improper venue is a severe penalty and should be reserved only for those actions which are instituted in an improper forum for purposes of harassment or in situations where some other element of bad fatih exists." (1 *Moore Federal Practice,* § 0.146-(1)-(5) (2d ed., 1948).

In the instant case, Commercial brought suit in the Middle District, not for purposes of harassment, but because the Middle District is the correct venue for this suit, provided jurisdiction is proper as to multiple plaintiffs. Both the courts and the text authorities are in agreement that in the absence of the element of bad faith in cases of incorrect venue the best

interests of justice are served by transferal of a case rather than by dismissal.

CONCLUSION

The questions presented in the instant case are of significant national importance and it is respectfully submitted that probable jurisdiction should be noted of this appeal.

DAVID S. CORDISH
Cordish & Cordish
Baltimore, Maryland

J. G. LACKEY, JR.
Stephenson, Lackey & Holman
Nashville, Tennessee

Counsel for Appellants

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 4417

ALTERMAN TRANSPORT LINES, INC., ET AL.,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.

Before: HARRY PHILLIPS, Circuit Judge, WILLIAM E. MILLER and FRANK GRAY, JR., District Judges.

MILLER, District Judge. Plaintiffs are corporations engaged in the business of transportation of goods by motor carrier in interstate commerce. In the conduct of such business, their trucks travel within the state of Tennessee. Plaintiffs' action names as defendants the Public Service Commission of Tennessee, the State Board of Equalization, and specified municipalities and counties as representatives of all the municipalities and counties of the state. The chief purpose of the action is to contest the validity of the taxing statutes, Tenn. Code Ann. §§ 67-901-931, under which plaintiffs presently are subject to yearly ad valorem taxes. As the plaintiffs seek an injunction restraining the enforcement of the statutes on the ground of unconstitutionality, a three-judge court was constituted pursuant to 28 U.S.C.A. § 2281.

Under the Tennessee taxing statutes, plaintiffs are classified as "irregular route motor carriers."[1] Such carriers are required to submit to the Public Service Commission, the state agency charged with the responsibility of assess-

[1] "Irregular route motor carriers" are defined as those carriers which are not limited by their permits, certificates or other operating authority from the Tennessee Public Service Commission to any particular highway or highways, road or roads, and/or specific route or routes. Tenn. Code Ann. § 67-901.

ing utility property, specified information including the number of miles traveled each year both within and without Tennessee.[2] Penalties may be invoked by the Commission for failure to comply with these reporting procedures. Ad valorem taxes on carriers are payable to the various counties and municipalities through which "irregular route carrier" trucks pass, determined in accordance with local rates of taxation.

The Tennessee Board of Equalization, after assessments have been made by the Public Service Commission, and by the various local assessing authorities for non-utility property, has the responsibility of equalizing the various assessments according to the terms of the Tennessee Constitution which provides that all property shall be assessed at actual cash value. In the case of utility property, the Board certifies the equalized assessment back to the Commission which then certifies to each local taxing authority the value of taxable property to be considered within the local jurisdiction. The distributable property of irregular route carriers in Tennessee is allocated to local taxing authorities on a proportional basis according to the ratio of mileage traveled within the local jurisdiction to the total mileage traveled by the carrier in the state. This is the system of taxation which plaintiffs now challenge.

Basically, plaintiffs' position is that the Tennessee statutes under which they are taxed are unconstitutional for the reason that the property so taxed has not been within the state long enough to acquire a tax situs. The statutes are also said to be unconstitutional in their application under the recent ruling in *Louisville & Nashville RR. Co.* v. *Public Service Commission,* 249 F. Supp. 894 (M.D.

[2] Plaintiffs here complain of the statutes with respect to "distributable property" which for motor carriers includes "franchises, choses in action, intangible property, and personal property within the state of Tennessee, but having no actual situs therein," and the movable property of such carriers. Tenn. Code Ann. § 67-920.

Tenn. 1966), since property assessed by the Public Service Commission is systematically assessed at a much higher rate than that assessed by local authorities. For relief, plaintiffs have requested an injunction against enforcement of the statutes on grounds of unconstitutionality, an injunction against the Commission and Board of Equalization prohibiting them from certifying, making, or distributing assessments against plaintiffs under these statutes, a declaration that assessments already made are void, recovery of all monies paid under the statutes, and a declaration of rights under 28 U.S.C.A. § 2201. Defendants have interposed motions to dismiss and for summary judgment upon which this action was heard April 28, 1966. At that time hearing was also held on plaintiffs' application for a temporary injunction. Defendants have based their motions largely on the grounds of lack of federal jurisdiction.

Plaintiffs have sought to invoke the jurisdiction of this Court on many and varied grounds. They have alleged that jurisdiction exists because of diversity of citizenship, the presence of a federal question, the fact that the action arises under an Act of Congress regulating Commerce as contemplated by 28 U.S.C.A. § 1337, and the fact that the practices complained of are violations of plaintiffs' rights under the Civil Rights Act, 28 U.S.C.A. § 1343(3). Plaintiffs characterize the action as a class action under Rule 23.

Under 28 U.S.C.A. § 1337, district courts have jurisdiction of actions arising under Acts of Congress regulating Commerce. Plaintiffs allege that this action arises under such an Act since compliance with the Tennessee statute is claimed to involve violations of various portions of the Code of Federal Regulations relating to highway safety as provided for in the Interstate Commerce Act of 1940. 54 Stat. 899 (1940). They allege that to comply with the reporting provisions of the Tennessee statutes as to mileage traveled they have been compelled to stop their trucks

in the middle of the night on lonely roads to search for boundary markers between the cities and counties of the state. This, it is alleged, results in the trucks constituting a menace to safety and the drivers often violating federal safety standards since it would not be practical to take the time to comply with all of the federal regulations relating to stops along the highways. Plaintiffs thus contend that the statutes constitute an unconstitutional burden on interstate commerce.

Despite plaintiffs' allegations that they are violating provisions of various Interstate Commerce Acts, it does not appear that they are forced to do so by the statutes in question. In addition, no restriction on interstate commerce appears as a necessary effect of the statutes. The Tennessee statutes require that motor carriers report the number of miles traveled within each of the local political subdivisions of the state. There is no provision as to how this should be accomplished. The method of compliance allegedly chosen by plaintiffs cannot be deemed a result of the challenged statutes unless it is demonstrated that this method is the only practical way that the required reporting may be accomplished. An allegation to this effect, conclusory in character, will not suffice to constitute a basis for jurisdiction, particularly if it appears to be unreasonable on its face. Since in normal travel it must be presumed that motor carriers use established routes and do not travel at random, the reason for frequent and repetitive stops to determine local boundary lines cannot be perceived. There is, furthermore, no allegation to the effect that the Public Service Commission requires such accurate reporting as would necessitate roadside measurements.[3] The controlling factor is not the conduct or action of the plaintiffs but the requirements or exactions of the defend-

[3] It is noteworthy that many of the plaintiffs have not reported any mileage at all, so that their contentions seeking to establish jurisdiction in this regard must fail for that reason alone.

ants imposed in compliance with the statutes. Where it is not fairly demonstrated that the actions of the defendants were taken under compulsion or pursuant to the mandate of the statutes, this Court must hold that there is no basis for jurisdiction under 28 U.S.C.A. § 1337.

Certain restrictions upon a federal court are applicable when it is asked to enjoin the enforcement of a state taxing statute. For example, federal courts are prohibited from enjoinig the enforcement of such statutes where there is a plain, speedy and efficient remedy in the state courts. 28 U.S.C.A. § 1341. As to one basis for this action, that of lack of situs, the Tennessee courts have demonstrated that adequate state remedies exist to challenge on this ground the validity of the statutes or any assessments made pursuant to them.[4] *Howard Sober, Inc.* v. *Clement,* 52 Tenn. App. 115, 372 S.W. 2d 202 (1960); *Jack Cole Co.* v. *Ellington,* 52 Tenn. App. 120, 372 S.W. 2d 204 (1961); *E & L Trans. Co.* v. *Ellington,* 212 Tenn. 671, 371 S.W. 2d 456 (1963). Were this the only ground for plaintiffs' action, this Court would be required to hold that it was precluded from exercising jurisdiction. As to the adequacy of state remedies, the case here is distinguishable from *Louisville & Nashville RR. Co.* v. *Public Service Commission, supra.* In that case it was pointed out on the basis of a number of

[4] In addition, the Tennessee statutes provide that any utility aggrieved by the assessment of the public Service Commission and fixed and certified by the Board of Equalization "shall be required to pay the taxes due and owing the state, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceedings that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the state, the counties and municipalities and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding." Tenn. Code Ann. § 67-929.

rulings of the Supreme Court of Tennessee that before a taxpayer could complain that his own property was assessed at a higher valuation than the property of his neighbor, in violation of the uniformity requirement of the state constitution, he must be able to allege and show that his own property was assessed at more than its actual cash value. This roadblock was one which cut across all procedural avenues—whether a suit for tax refund after payment under protest, an application to the courts to review by certiorari the findings of the Equalization Board, or a suit in equity to enjoin the challenged assessment as the basis for local taxes—effectively barring access to either of them. No such barrier exists when a taxpayer is complaining that the state is without power to impose the challenged tax or assessment for lack of a tax situs.

Since there is an adequate state remedy with respect to situs, we next consider the question of equal protection raised by plaintiffs' assertion that utility property is systematically assessed on the basis of higher assessments than non-utility property, in violation of the state constitution. Such a contention presents a federal question within the terms of 28 U.S.C.A. § 1331. A federal court will not consider all actions involving a federal question, however, since Congress has remitted some cases in this category to the state courts with ultimate review by the Supreme Court of the United States. The determinative factor is the presence or absence of the required jurisdictional amount.

As stated, plaintiffs have characterized the action as a class action with the named defendants acting as representatives for all the municipalities and counties of Tennessee. They further contend that the amount in controversy for each plaintiff must be computed by aggregating the tax liabilities owed and paid to all such defendants. To support their theory that aggregation should be permitted, plaintiffs allege that defendants have conspired and acted in concert to deprive them of their rights.

Although the Tennessee Constitution requires that all property be assessed at actual cash value, the various counties and municipalities of Tennessee have been in the habit of establishing assessment rates which are considerably less than 100% of actual value. These assessment rates vary from county to county but apparently no county assesses property at over 50% of actual value. The Public Service Commission, on the other hand, assesses property at much higher rates, approaching in some cases 100% of actual value. A difference thus appears between the treatment of utility and non-utility property. Cf. *Louisville & Nashville RR. Co.* v. *Public Service Commission, supra.* Yet this fact alone is hardly sufficient to warrant the inference of a conspiracy, even assuming that the existence of such a conspiracy would be legally sufficient to justify an aggregation of claims for jurisdictional purposes. In fact, each of the local taxing authorities has an assessment rate as to non-utility property which is generally different from those of the other taxing authorities. The only common factor is that each of the rates is less than 100%. Mere allegations of general similarity in action do not support the theory that a conspiracy is present. We conclude that to determine whether the jurisdictional amount is present the Court must consider the amount in controversy between each plaintiff and each defendant separately.

Plaintiffs have urged the Court to consider the cost of compliance with the statutes in determining the amount in controversy. Since the statutes require the filing out of various forms, plaintiffs contend that the statutes should be considered as regulatory so that the cost of compliance would be the amount in controversy. The mere fact that the statute requires the completion of forms even if no tax may be due does not, however, change the essential nature of the statute as a tax measure. The regulations complained of by plaintiffs are clearly incidental to the taxing aspect of the statute and the amount in controversy

is therefore the value of the tax and not the cost of compliance with the statute.

As to the defendant municipalities and counties there is a lack of the requisite jurisdictional amount between any one plaintiff and any one defendant insofar as the amount of taxes owing or paid is concerned. The only apparent exception is the case of the plaintiff Commercial Carrier Corporation and defendant Shelby County. But since neither of these parties resides within this district, there would be a lack of jurisdiction of this claim, standing alone, under the venue statute, 28 U.S.C.A. § 1391.

The Civil Rights Act, 28 U.S.C.A. § 1343, remains as the only possibility for a proper exercise of jurisdiction by a federal court of the claims against the defendant municipalities and counties This statute provides that district courts shall have original jurisdiction to redress the deprivation, under color of any state law, of any rights, privileges or immunities secured by the Constitution of the United States. Plaintiffs' contention in this respect is that they have been excluded from the class of property owners to which they rightfully belong since they are treated differently from ordinary property owners in Tennessee. This position is advanced because the Civil Rights Act contains no restriction as to the amount in controversy. The Act, however, may be thought of as a remedy in cases where the right asserted is incapable of pecuniary valuation. *Detroit Edison Co.* v. *East China Township School Dist.*, 247 F. Supp. 296 (E.D. Mich. 1965). Generally, jurisdiction under this Act cannot be invoked in a pure tax action. A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically. Where plaintiffs' remedies are of the sort classically associated with tax actions and the claims are of a property nature, a federal court should not accept jurisdiction solely on this basis. Cf. *Olan Mills, Inc.* v. *Opelika, Alabama*, 207 F. Supp. 332 (M.D. Ala. 1962). Otherwise, the jurisdic-

tional amount provisions of 28 U.S.C.A. §§ 1331 and 1332 could easily be circumvented by a mere allegation of denial of equal protection. This would be true even if the amount in controversy were readily ascertainable. Equal protection in tax actions may constitute a federal question but it does not necessarily involve a corresponding Civil Rights Act violation. Plaintiffs seek further to support their position by noting that the practices of which they complain are of a long-standing nature. While this may be a necessary factor in actions under the section in question, presence of such allegations will not, ex proprio vigore, invoke such jurisdiction in what is basically a tax case.

The Court, then, is prohibited from granting the requested relief with regard to the defendant municipalities and counties for the reason that it lacks jurisdiction to do so. As to the remaining defendants, the Public Service Commission and the Board of Equalization, jurisdiction is lacking under 28 U.S.C.A. §§ 1337 and 1343 for reasons already indicated. Insofar as jurisdiction is invoked upon equal protection grounds, plaintiffs are again met by an inability to establish the existence of the requisite jurisdictional amount. Since assessments are made by the Public Service Commission every two years, the Commission does not at present have any control over the subject matter of the action, the principal assessments having been certified to the local taxing authorities. Plaintiffs allege that supplemental assessments are made by the Commission and that such assessments are at present under the control of the Commission. Not only is there a failure to show the amount of these assessments, but perhaps of greater significance is the fact that the assessments are still in the administrative process. They have not been finally equalized or determined, and we must consider that plaintiffs' allegations with respect to them are premature. A federal court will not undertake to determine by injunctive process or otherwise the future course of state ad-

ministrative proceedings since it cannot be assumed that state agencies will act unlawfully.

The Tennessee statutes provide that failure to comply with the reporting procedures of the taxing statutes makes an offending party liable to a penalty in the amount of $100 a day for each day that the necessary forms are not filed. These penalties are not automatic, being enforceable only upon the request of the Public Service Commission. Tenn. Code Ann. § 67-914. Several of the plaintiffs would be liable for large sums under this statute if the penalties were invoked against them. Accordingly they have suggested that the Court should take such penalties into account in determining whether the jurisdictional amount requirement has been satisfied. In our view the possibility that such penalties may be invoked is of such speculative nature insofar as the actual controversey between the parties is concerned that it will not support an action in which the jurisdictional amount is required.

In summary, we hold that the motions do dismiss on behalf of all the named defendants should be sustained for the reason that plaintiffs have failed to demonstrate sufficient facts upon which a federal court should assume jurisdiction. As to the defendant counties and municipalities, plaintiffs do not allege that the jurisdictional amount is present as to each defendant. Similarly, as to the Public Service Commission and the Equalization Board, the Court holds that the amount in controversy between plaintiffs and defendants has not been shown to exceed $10,000 since these defendants have already performed their functions with regard to the subject matter of the controversy and no longer have control over it. The Court will not undertake to enjoin assessments that may be made in the future since it cannot be assumed that they will be made in a discriminatory manner condemned by this Court in the recent decision in *Louisville & Nashville RR. Co.* v.

Public Service Commission, supra.[5] For reasons indicated plaintiffs cannot properly bring this action under the terms of 28 U.S.C.A. § 1337 or § 1343. Further, the Court is precluded from granting a declaratory judgment both because of the absence of jurisdictional amount and the presence of an adequate state remedy with respect to the issue of situs. Cf. *Wyandotte Chemical Corp.* v. *City of Wyandotte,* 321 F. 2d 927 (6th Cir. 1963).

An order will be entered implementing this opinion, sustaining the defendants' motions to dismiss, and denying the relief sought by the plaintiffs.

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[5] Only as to supplemental assessments do the plaintiffs allege a case approaching the situation confronting the Court in *Louisville & Nashville RR. Co.* v. *Public Service Commission.* In that case the jurisdictional amount was clearly present and the assessments were within the control of the Public Service Commission and Equalization Board. Here, however, the principal assessments have been certified back to local taxing authorities and the supplemental assessments are still involved in the administrative process, the outcome of which the Court cannot anticipate.

APPENDIX II

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 4417

ALTERMAN TRANSPORT LINES, INC., ET AL.,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.

Order

In this action, the Court having entered and filed its opinion directing that an order be entered sustaining the defendants' motions to dismiss, and denying the relief sought by the plaintiffs,

It is therefore ordered, for the reasons and upon the grounds set forth in said opinion, that the defendants' motions to dismiss be, and the same are hereby, sustained, and that the plaintiffs' action be, and the same is hereby, dismissed.

HARRY PHILLIPS
Circuit Judge

WILLIAM E. MILLER
District Judge

FRANK GRAY, JR.
District Judge

(SEAL)

ATTEST: A TRUE COPY

Brandon Lewis, Clerk
U. S .District Court
Middle District of Tennessee
By L. N. EDWARDS D.C.

APPENDIX III

Chapter 9, Section 67, Tennessee Code Annotated—Assessment of Utilities and Carriers

67-901. Assessment by public service commission—Companies included—Situs of motor carriers.—The Tennessee public service commission, hereinafter called the commission, is authorized and directed to assess for taxation, for state, county and municipal purposes, all of the properties of every description, tangible and intangible, within the state, belonging to the following named persons, hereinafter referred to as companies, namely: (1) railroads; . . . (12) motor bus and/or truck companies, which shall be deemed to include every motor carrier operating within, into and/or through the state of Tennessee under and by virtue of any certificate of convenience and necessity, permit or other operating authority granted by the Tennessee public service commission under the provisions of Title 65, Chapter 15, Tennessee Code Annotated; and (13) water companies. The commission shall assess all of said property biennially in odd years at its actual cash value as of the same date the properties of other persons are by law assessed; provided, this chapter shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture of products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars.

All motor carriers, including any such carrier not limited by its certificate, permit or other operating authority from the Tennessee public service commission to any particular highway or highways, road or roads, and/or specific route or routes (which carrier shall be designated and is hereinafter referred to as an "irregular route motor carrier"), operating within, into and/or through Tennessee and having been issued a permit or certificate of convenience and necessity by said commission shall, by virture of their operations or right to conduct operations within, into and/or through Tennessee over the public highways of Tennessee, be deemed to have a situs in Tennessee, the same to be deter-

minded and ascertained by said commission, and any such carrier shall, as a condition precedent to the granting or exercise of such authority, appoint an agent within the state of Tennessee for the purpose of service of process.

67-906. Traction companies—Motor carriers.— . . .B.

(2) From all irregular route motor carriers as defined in § 67-901; the total number of miles operated within, into and/or through the state of Tennessee by all the motor vehicles (which shall include vehicles operated by the carrier under any lease or leases; but which shall not include any vehicle operated exclusively within any one county or incorporated municipality) of any such carrier during the prior calendar year, together with the number of vehicle miles operated during the prior calendar year within, into and/or through each county, incorporated municipally and/or taxing district authorized by law to collect ad valorem taxes within the state of Tennessee.

(3) From all motor carriers; (a) the number of vehicles, their class and/or kind, the cost and value of each vehicle owned and/or operated by any such motor carrier; (b) the total number of vehicle miles operated by any such motor carrier, together with the total number of vehicle miles operated within, into and/or through the state of Tennessee during the prior calendar year; (c) the location and description of all buildings, land, materials and supplies, tools and equipment, furniture, motor vehicles operated exclusively within any one county or incorporated municipality, and other personal property, showing the cost and value of all such property, separately set forth to show same (1) within the state of Tennessee and (2) outside the state of Tennessee.

67-913. Waiver of objection to assessment by failure to file schedule—Penalty.—The owner of any such property refusing or failing to file such schedules and statements shall be deemed to have waived the mode and manner of ascertaining the value of such property, and of the dis-

tribution or allocation by the Tennessee public service commission of such valuation or assessment to the various counties and municipalities of the state of Tennessee for the purposes of county and municipal taxation, and shall not be permitted to be heard in opposition to the valuation fixed upon said property by the commission, nor in opposition to the distribution or allocation of same by the commission to the various counties and municipalities for the purposes aforesaid; and shall in addition be liable to a penalty of one hundred dollars ($100) for each and every day which such owner is delinquent in filing said statement or schedule.

67-914. Action for penalty for failing to file schedule.—It shall be the duty of the attorney-general of the state, upon the request of the commission to sue for and collect the same before any court of competent jurisdiction in the same manner as any other debt, penalty, or forfeiture is now collected by law.

67-920. Distributable property—Apportionment by mileage.— . . .

B. The franchises, choses in action, intangible property, and personal property within the state of Tennessee, but having no actual situs therein, of each motor carrier to be assessed under this chapter, and in addition thereto, the motor vehicles, buses, trucks, tractors, trailers and movable property of such motor carriers shall be known as distributable property and shall be assessed separately from the other property, if any within the state of Tennessee, of such motor carriers; after ascertaining the value of such distributable property wherever situated within the state, and after having deducted from its value one thousand dollars ($1,000), the commission shall: . . .

(2) with respect to all "irregular route motor carriers" as defined in § 67-901, divide the remainder by the total number of miles operated within, into/or through the state of Tennessee by all of the motor vehicles (which shall include

vehicles operated by the carrier under any lease or leases) of any such carrier during the prior calendar year and the result thereof shall be the value per vehicle mile of the distributable property of such motor carriers for the purposes of assessment and county and municipal ad valorem taxation, and the value per vehicle mile shall be multiplied by the number of vehicle miles operated during the prior calendar year within, into and/or through each and every county, incorporated municipality and/or taxing district in or through which any such carrier operated during such prior calendar year, and the product thereof shall be the amount to be assessed against such distributable property for any and all such counties, municipalities, and/or taxing districts.

The commission is expressly authorized and empowered to distribute the assessments or values assessed against the distributable property of motor carriers, including "irregular route carriers," for the purposes of county and municipal ad valorem taxation, in the manner prescribed by this chapter, to the counties, municipalities and/or taxing districts within the state of Tennessee, in the manner and upon the basis hereinabove set forth in this section. [Acts 1919, ch. 3, § 6; Shan. Supp., § 859a76; Code 1932, § 1528; Acts 1957, ch. 191, § 6.]

67-931. Certification to local officials—Collection and disposition of tax.—As soon as the commission shall have received said valuation from the board of equalization, the commission shall certify to the trustee and county tax assessor of each county in which any of such property lies, the amount to be taxed in said counties, respectively, for county purposes; and likewise to the city recorder and/or city official whose responsibility it is to collect the tax of any incorporated city or town the amount to be taxed by such city or town. The amount of the state tax shall be collected by the commission. The proceeds from the state tax shall be paid by the commission into the state treasury in the manner and for the purposes provided by § 49-601.

APPENDIX IV

Exhibit "H"

Affidavit of Alterman Transport Lines, Inc.

State of Florida }
County of Dade } To wit:—

I HEREBY CERTIFY that before me, a Notary Public, in and for the State and County aforesaid, on the 28th day of June, 1966, personally appeared Sidney Alterman the President of Alterman Transport Lines, Inc. a body corporate of the State of Florida, he being the duly authorized agent of said Corporation to make this affidavit, and in behalf of said Corporation, he did make oath in due form of law and depose and say as follows:

Alterman Transport Lines., a body corporate, has an Ad Valorem Tax liability to the Counties and Municipalities of the State of Tennessee for the years 1965-1966, for a sum in excess of $10,000.00.

As WITNESS, the signature of said Deponent and my hand and Notarial Seal the day and year aforesaid.

SIDNEY ALTERMAN PRESENT
Deponent.

VIOLA F. DOERR
Notary Public.

The following carriers also filed identical Exhibits:
Jack Cole Company, Inc.
Bowman Transportation Company, Inc.
Harper Motor Lines, Inc.

APPENDIX V

Exhibit "G"

Affidavit of Yeary Transfer Company, Inc.

STATE OF KENTUCKY
COUNTY OF } To wit:—

I HEREBY CERTIFY that before me, a Notary Public, in and for the State and County aforesaid, on this 28th day of June, 1966, personally appeared Roger E. Van Sickle the Treasurer of Yeary Transfer Company, Inc. a body corporate of the State of Kentucky, he being the duly authorized agent of said Corporation to make this affidavit, and in behalf of said Corporation, he did make oath in due form of law and depose and say as follows:

The rolling stock of Yeary Transfer Company, Inc. has been assessed every year since at least 1954 for Ad Valorem Taxes by the Counties and Municipalities of Tennessee.

All of the property of said corporation is taxed for Ad Valorem purposes by the State of domicile of said corporation, including the rolling stock that is taxed by the Counties and Municipalities of Tennessee.

The State of Domicile of said corporation taxes the property of said corporation on 100% of its value, and does not give a credit for Ad Valorem Tax assessments or payments of said assessments, to the Counties and Municipalities of Tennessee. The Counties and Municipalities of Tennessee assess and collect Ad Valorem Taxes on the rolling stock of said corporation despite the fact that said property has previously been taxed at a valuation of 100% for Ad Valorem purposes by the state of domicile of said corporation.

The above practices have resulted, now result and will henceforth result in some of the property of the said corporation being taxed at more than 100% of its value.

As Witness the signature of said Deponent and my hand and Notarial Seal the day and year aforesaid.

Roger E. Van Sickle
Deponent.

Gladys S. Kincaid
Notary Public.

The following carriers also filed identical Exhibits:

Bowman Transportation, Inc.,
Bilyeu Refrigerated Transport Corporation,
Harper Motor Lines, Inc.

APPENDIX VI

Tennessee Constitution

The Constitution of the State of Tennessee provides as follows:

> All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value. . . . (Art. 2 § 28)

> The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law: and all property shall be taxed according to its value, upon the principles established in regard to State taxation. (Art. 2. § 29)

Tennessee Statutes

The Statutes of Tennessee (Tennessee Code Annotated) provide, in part, as follows:

67-605. *Basis of valuation.*—All property of every kind shall be assessed at its actual cash value. The term "actual cash value" is defined to mean the amount of money the property would sell for, if sold at a fair, voluntary sale.

67-623. *Penalty for omission, underassessment or copying from previous assessments.*—It shall be unlawful for any assessor or deputy willfully, knowingly, or negligently to permit or allow any property subject to taxation to be or remain unassessed or omitted from assessment, or willfully, knowingly, or negligently to assess any property at less than its cash value, or to assess any property solely by substitution or copy from former assessment.

67-307. *Oath of Office.*—Each assessor shall take and subscribe to the following oath of office. . . . "I . . . do solemnly swear . . . that I will assess all taxable property, real and personal and mixed, at its actual cash value . . . ,"

67-801. *Duties of county board of equalization.*—. . . Said board shall have the power, and it is hereby made its duty, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of all property contained therein, and make such assessment conform to the actual cash value of the property described in the assessment . . . . If the property described in said assessment lists or any part thereof shall have been assessed at less than the actual cash value thereof, the value of the same shall be increased so as to conform to the actual cash value thereof: . . . it being the intention of this chapter that the county board of equalizers

shall equalize and compute the value of all property in the county upon the same rate of valuation, so that all property, real, personal and mixed, shall have uniformity of valuation upon actual cash value.

67-810. *Underassessment prohibited.*—It is declared unlawful for any county board of equalization, or any member thereof, willfully, knowingly, or negligently to compute, fix, or equalize, or willfully, knowingly, or negligently to permit or suffer the same to be done, the value of any property at less than its actual cash value.

67-811. *Proceedings for penalty against county equalizers.*—If, in equalizing the properties, it shall come to the knowledge of the state board of equalization, or should it have reasonable grounds to believe such is the case, that any county board of equalizers, or any member thereof, has violated § 67-810, it shall be the duty of said state board to immediately notify the commissioner of revenue of the same, and it shall thereupon be the duty of said commissioner to immediately direct an agent of the state, or the district attorney of the district in which the offense is committed, to institute proceedings to recover the penalty prescribed in § 67-1710, which said direction shall be complied with by such district attorney or revenue agent.

67-812. *Proceedings against assessors for penalty.*—It shall be the duty of the members of the county board of equalizers, when it is known to or reasonably suspected by any one of them that any assessor or deputy has knowingly, willfully, or negligently assessed any property at less than the actual cash value of same, to report the same to the district attorney or proper officer of the state, whose duty it shall be, upon receiving such information, to institute proceedings

against the assessor upon his bond to recover the penalty prescribed in § 67-1710.

67-818. *Board's indorsement on assessment rolls.*—Upon returning the assessment rolls of the county to the county court clerk, the said board of equalizers shall append to or indorse upon the same a certificate signed by each member, viz.: "We . . . have equalized, computed, and fixed the values of all properties set out in the assessment rolls of said county, upon the standard of the actual cash value of the same, by raising the values of all properties assessed at less than the actual cash value thereof to the actual cash value of the same . . . ."

67-207. *Oath of board members.*—It shall be the duty of the members (of the state board) to . . . subscribe to an oath that they will fairly and impartially perform the duties fixed upon them by this chapter, and equalize, fix, and compute the values of properties within their jurisdiction, so that the value thereof shall conform to the standard of the actual cash value of the same.

APPENDIX VII

Exhibit "F"

Affidavit of Yeary Transfer Company, Inc.

STATE OF KENTUCKY
COUNTY OF } To wit:—

I HEREBY CERTIFY that before me, a Notary Public, in and for the State and County aforesaid, on the 28th day of June, 1966, personally appeared Roger E. Van Sickle the Treasurer of Yeary Transfer Company, Inc. a body corporate of the State of Kentucky, he being the duly authorized agent of said Corporation to make this affidavit, and in behalf of said Corporation, he did make oath in due form of law and depose and say as follows:

The cost of complying with the regulatory and reporting aspects of Tennessee Code Annotated, Title 67, Chapter 9, Sections 901-931, and more particularly the cost of furnishing to the State of Tennessee, every biennium, the information requested in Tennessee Code Annotated, Title 67, Chapter 9, Section 906 is in excess of the sum of $38,000.00.

As WITNESS, the signature of said Deponent and my hand and Notarial Seal the day and year aforesaid.

ROGER E. VAN SICKLE
Deponent.

GLADYS S. KINCAID
Notary Public.

Bowman Transportation, Inc.—filed an identical Exhibit and estimated its cost at $20,000.00.

Harper Motor Lines, Inc.—filed an identical Exhibit and estimated its cost at $16,000.00.

Jack Cole Company, Inc.—filed an identical Exhibit and estimated its cost at $50,000.00.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 942.

ALTERMAN TRANSPORT LINES, INC., et al.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE et al.,
Appellees.

APPELLEES' MOTION TO DISMISS

and

BRIEF IN SUPPORT THEREOF.

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IN THE

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v.

PUBLIC SERVICE COMMISSION OF TENNESSEE et al.,
Appellees.

APPELLEES' MOTION TO DISMISS.

Pursuant to Rule 16 of the Supreme Court of the United States, the appellees move the court to dismiss this appeal on the ground that the three-judge district court was not required to be convened in this case as the federal constitutional questions relating to the validity of the state statute presented by the appellants' petition are wholly unsubstantial in view of earlier decisions of this Court. Therefore, a direct appeal may not be taken to the Supreme Court of the United States from the action of the district court.

U. S. C., Section 2281, does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking, nonexistent.

The Supreme Court of the United States lacks jurisdiction over this direct appeal from a three-judge district court because the three-judge court was improperly convened as the allegations of the petition relating to the unconstitutionality of the Tennessee statute are insubstantial.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 942.

ALTERMAN TRANSPORT LINES, INC., et al.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE et al.,
Appellees.

BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS.

OPINION BELOW.

The opinion delivered in the court below is not as yet reported. A copy of the opinion is attached as Appendix I to appellants' brief.

JURISDICTIONAL STATEMENT.

Appellants contend jurisdiction for this appeal is based on Title 28 of the **United States Code**, Section 1253. It is the purpose of appellees' motion to dismiss and this accompanying brief to challenge that contention as will more fully appear herein.

STATUTES INVOLVED.

28 U. S. C., § 1253. **Direct appeals from decisions of three-judge courts.**

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

28 U. S. C., § 2281. **Injunction against enforcement of State statute; three-judge court required.**

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by the district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

As stated by the appellants on page 4 of their brief, they challenged the validity of **Chapter 9, Title 67,** of the **Tennessee Code Annotated,** portions of which are attached to the appellants' brief as Appendix III; however, certain sections germane to the issues in this case were not included in the appendix to the appellants' brief and they have been included as an appendix to this brief as Appendix 1. Those sections of Tennessee Code Annotated which have been added by inclusion in the appendix to this brief are §§ 67-902, 67-918 and 67-919.

QUESTIONS INVOLVED.

1. Does the Supreme Court of the United States have jurisdiction to hear a direct appeal from a three-judge federal court where a State statute is challenged on insubstantial federal constitutional grounds, though substantial federal questions may exist in the case other than the constitutionality of the State statute?

2. Does the challenge of a State statute present a substantial federal constitutional question in the light of prior decisions of the Supreme Court, where the statute provides for the assessment of an ad valorem tax on the trucks and trailers of foreign corporate motor carriers in such State based on the number of miles operated within, into and through the State by all of the motor vehicles of any such carrier, even though the trucks and trailers were neither permanently in those jurisdictions nor operated there on fixed routes and regular schedules?

STATEMENT OF THE CASE.

Chapter 9, Title 67, of Tennessee Code Annotated, insofar as it relates to appellants as irregular route carriers, provides for the assessment for taxation of appellants' property on the basis of a formula which fairly apportions the tax to the commerce carried on in Tennessee by assessing and levying a tax on an average portion of property permanently within the State (Appellants' brief, Appendix III, page 13a, Appellees' brief, Appendix 1).

On November 15, 1965, in **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** 382 U. S. 106, 15 L. ed. 2d 191, this court dismissed an appeal from the Supreme Court of Tennessee for want of a substantial federal question in a case in which the Supreme Court of Tennessee had denied a writ of certiorari to review a decision of the Court of Appeals of Tennessee holding **Chapter 9, Title 67,** of the **Tennessee Code Annotated,** valid and not in violation of either the "Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution or of Article I, Section 8 of the Constitution of the United States." The full text of the decision of the Court of Appeals is attached hereto as Appendix 2 and is styled **Aero Mayflower Transit Company et al. v. Cayce R. Pentecost et al.** This is the same case which was dismissed on appeal to the Supreme Court of the United States under the style of **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** *supra,* the difference in the names being caused by one of the appellants, Aero Mayflower Transit Company, withdrawing from the case prior to the appeal to the Supreme Court of the United States.

The appellants in the instant case and those in **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** *supra,*

raise the same constitutional issues in attacking the identical statute under similar allegations of facts. This court dismissed the appeal in **Burnham Van Service et al. v. Cayce R. Pentecost et al.**, *supra*, for want of a substantial federal question and the decision in the **Burnham** case is applicable to the present case as the constitutional questions, the facts and the statute under attack are the same in the two cases.

Prior decisions of this court have sustained the levy of *ad valorem* taxes by states and their political subdivisions on the vehicles and vessels of foreign corporations, under statutes similar to the one here in question, even though such carrier facilities were neither permanently in those jurisdictions nor operated there on fixed routes and regular schedules. **Ott v. Mississippi Valley Barge Line Co.**, 336 U. S. 169, 93 L. ed. 585, 69 S. Ct. 432; **Nashville, C. & St. L. R. Co. v. Browning**, 310 U. S. 362, 365, 84 L. ed. 1254, 1255, 60 S. Ct. 968; **Pullman's Palace Car Company v. Pennsylvania**, 141 U. S. 18, 35 L. ed. 613, 11 S. Ct. 876.[1]

---

[1] **Central R. Co. of Pa. v. Pennsylvania**, 370 U. S. 607, 8 L. ed. 2d 720, 82 S. Ct. 1297, cited and relied on by the appellants, was decided on the evidence and the court held that the appellant failed to "sustain its burden of proving that a tax situs had been acquired elsewhere." The court in the **Central R. Co. of Pa.** case did not have before it a taxing statute of a non-domiciliary State for construction and that case is not in point as it was decided strictly on the presence or absence of proof and is not similar to the instant case.

ARGUMENT.

The Supreme Court of the United States Lacks Jurisdiction to Hear a Direct Appeal From an Improperly Convened Three-Judge Federal Court.

It is the position of the appellees that the Supreme Court of the United States is without jurisdiction of this direct appeal from the district court as the three-judge district court was not properly convened. The allegations of the appellants' petition to the district court attacking the validity of **Chapter 9 of Title 67, Tennessee Code Annotated,** are wholly without substance by reason of prior decisions of this Court which have resolved the constitutional questions raised concerning the State statute. This Court has held the same constitutional attack on this statute to be without substance in **Burnham Van Service et al. v. Pentecost et al.,** *supra*, in which an appeal from the action of the Tennessee courts upholding the statute was dismissed for want of a substantial federal question.

Prior decisions of this Court have sustained the constitutionality of statutes similar to the Tennessee statute here under attack, and the same constitutional issues raised by the appellants in this case have been previously determined in favor of the constitutionality of the statutes. **Ott v. Mississippi Valley Barge Line Co.,** *supra*; **Nashville, C. & St. L. R. Co. v. Browning,** *supra*; **Pullman's Palace Car Company v. Pennsylvania,** *supra*.

Statutory Requirements for Appeal.

The appellants base their appeal on 28 U. S. C., § 1253, which provides for a direct appeal to the Supreme Court of the United States from an order of a three-judge district court granting or denying an injunction in a suit of proceeding **required by an Act of Congress to be heard and determined by a three-judge district court.** Where the three-judge district court was not **required** to hear the case by an Act of Congress the Supreme Court is without

jurisdiction to hear the case on a direct appeal from the three-judge district court.

The three-judge court was constituted under the supposed authority of 28 U. S. C., § 2281 (Appellants' Brief, page 1a). The specific provisions of 28 U. S. C., § 2281, limit the requirements for a three-judge district court to proceedings in which a federal district court is asked to enjoin the enforcement of a state statute "on the ground of the unconstitutionality of such statute." This Court has specifically held that 28 U. S. C., § 2281, "does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent;" and that "three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute" is unconstitutional. **Bailey v. Patterson,** 269 U. S. 31, 33, 7 L. Ed. 2d 512, 82 S. Ct. 549.

28 U. S. C., § 2281, comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a State statute. There is no such ground when the constitutional issue presented is insubstantial and essentially fictitious. **Bailey v. Patterson,** *supra.*

Cases Denying Jurisdiction.

The appellants correctly state the law that "In an injunctive action challenging a State statute on a substantial federal constitutional ground, both the three-judge court and this court on direct appeal have jurisdiction over all claims raised against the State statute." The converse is also true and it is well settled that where a State statute is challenged on an insubstantial claim of unconstitutionality the three-judge court is not required by an Act of Congress and a direct appeal cannot be taken to the Supreme Court from an order of three-judge court denying an injunction. **Bailey v. Patterson,** *supra*; **Phillips v. United States,** 312 U. S. 246, 248, 85 L. Ed. 800, 803, 61 S. Ct. 480; **Ex parte Bransford,** 310 U. S. 354, 84 L. Ed. 1249, 60 S. Ct. 947.

If the challenge of the State statute is not on a substantial federal constitutional ground a direct appeal to the Supreme Court will not lie, even though there may be other substantial federal questions involved in the case which are reviewable by the Circuit Court of Appeals. **Phillips v. United States,** *supra.* In the instant case, the appellants have preserved their rights to an appeal to the Circuit Court of Appeals for the 6th Circuit which has deferred docketing this case in that court pending the action of the Supreme Court on the jurisdictional question. A copy of the order of the Circuit Court of Appeals is attached hereto as Appendix 3. The disallowance of a direct appeal to the Supreme Court will not deprive the appellants of a review of the district court's decision as they have preserved their rights to appeal to the Circuit Court of Appeals.

Some of the cases cited by the appellants on page 3 of their brief as sustaining jurisdiction are cases in which state or federal statutes were challenged on clearly substantial federal constitutional grounds and were not cases where the constitutional questions raised had been previously settled by prior decisions of the Supreme Court.

Kesler v. Department of Public Safety, 369 U. S. 153, 7 L. ed. 2d 641, 82 S. Ct. 807, cited by the appellants on page 3 of their brief, has been specifically overruled by **Swift and Company v. Wickham,** 382 U. S. 111, 15 L. ed. 2d 194, 86 S. Ct. 258, and is no longer authority on the jurisdictional point.

California Water Service Co. v. City of Redding, 304 U. S. 252, 82 L. ed. 1323, 58 S. Ct. 865, is not authority for a direct appeal from a three-judge district court under circumstances similar to those in the instant case. In **California Water Service Co. v. Redding,** *supra,* the court held that a federal question averred as the basis for federal jurisdiction may be plainly insubstantial either because obviously without merit or because its unsoundness so clearly results from previous decisions of the Su-

preme Court of the United States as to foreclose the subject and, if the federal question lacks substance, the presence of a local question will not save jurisdiction.

For the reasons stated, the cases cited by the appellants in support of the jurisdiction of the Supreme Court on a direct appeal from a three-judge district court are not applicable to this case.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the motion of the appellees should be granted and this direct appeal to the Supreme Court be dismissed.

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SEYMOUR SAMUELS, JR.,
Nashville, Tennessee 37201,
Counsel of Record for the Appellee Cities and Counties.

EUGENE W. WARD,
General Counsel, Public Service Commission of Tennessee,
Cordell Hull Building,
Nashville, Tennessee 37219.

Certificate of Service.

I, Milton P. Rice, Assistant Attorney General, State of Tennessee, one of the attorneys for appellees, movants herein, do hereby certify that I have served a copy of the foregoing motion to dismiss and brief in support thereof upon the Honorable David S. Cordish, Cordish & Cordish, 613 Munsey Building, Baltimore, Maryland, by mailing same to him at said address, United States postage prepaid.

This .. day of January, 1967.

.....

APPENDICES.

APPENDIX 1.

Chapter 9, Section 67, Tennessee Code Annotated—Assessment of Utilities and Carriers.

67-902. **Filing of schedules by owners.—Contents.**—It shall be the duty of the owners of property mentioned in § 67-901, within the state, to file with the commission on or before the first day of April, biennially, in the odd years, under oath, schedules and statements giving the following information concerning all properties owned or leased by such owners: (1) the name of the company, its nature, whether a person, association, copartnership, corporation, or syndicate, and under the laws of what state or country organized; (2) the location of its principal place of business, the post office address of the president, general manager, or executive officer or officers; (3) the name and post office address of the chief officer or managing agent of the company in Tennessee; (4) the gross receipts of its business as a whole and also of its business done within the state, and operating expenses for the preceding fiscal year; (5) the total capital stock, number of shares issued or outstanding, the par face value thereof, and in case no shares of stock are issued, in what manner its capital is divided, and its holdings evidenced; (6) the market value of said shares of stock or capital on the tenth (10th) day of January next preceding, or if said stock or capital have no market value, then the actual value; (7) the real estate, buildings, machinery, fixtures, appliances and personal property owned by said company which is actually located within this state, the actual value thereof and the counties or municipalities in which the same are located; (8) real estate, together with the permanent improvements thereon, situated outside of the state and not directly used in the conduct of the business within the state, the purpose for

which it is used, its value and the sum at which it is assessed for taxation in the locality where situated; (9) the bonded indebtedness and the market value thereof, if it has such, otherwise its actual value.

In addition to the foregoing information to be given by each owner of property assessable under this chapter, said statement shall contain information as set out in §§ 67-903—67-911.

67-918. **Determination of value.**—Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons.

67-919. **Apportionment of intangibles.**—The proportionate share of the value of the intangible property of such companies as do business in this and other states, growing out of the use of their tangible property in this state under their franchises, privileges, and contracts, shall have its situs in this state and in the several counties and municipalities thereof in which they exercise their rights; provided, that property of any such owner located outside of the state which is not directly used in the business to which the property in the state is devoted, shall not enter into the value of the property within the state to be assessed.

APPENDIX 2.

Aero Mayflower Transit Company, et al.,
Complainants-Appellants,
vs.
Cayce R. Pentecost, et al.,
Defendants-Appellees.

} Davidson Equity.

Court of Appeals of Tennessee Middle Section
at Nashville.

Appeal from the Chancery Court of Davidson County.

Honorable Ned Lentz, Chancellor

Stephenson, Lackey & Holman of Nashville, Solicitors for Complainants-Appellants.

George F. McCanless, Attorney General of Nashville, Milton P. Rice, Assistant Attorney General of Nashville, Walker T. Tipton, Assistant Attorney General of Nashville, Solicitors for Appellee—State Board of Equalization.

George Shuff of Nashville, Solicitor for Appellee—Public Service Commission.

Affirmed.

Filed .....

Chester C. Chattin,
Judge.

Complainants did not furnish the requested information. Nine of the complainants refused or failed to furnish the Commission with any information requested. However, twenty of the twenty-nine complainants did file schedules or statements of various amounts of mileage their trucks had operated into, within and through Tennessee during the year 1958.

The Commission made assessments for ad valorem taxes for the biennum 1959-60 against the complainants. The assessments were appealed to the State Board of Equalization which affirmed the assessments.

Thereupon, complainants filed a petition in the Chancery Court of Davidson County for the writs of certiorari and supersedeas. They also sought an injunction prohibiting the Commission from making distribution of the assessments to the various counties and municipalities of the state for ad valorem tax purposes. The petition prayed for a declaratory judgment declaring the rights of complainants and the extent to which movable properties must be in the state and the local political subdivisions thereof to be subject to local ad valorem taxes.

The theory of the petition is that T. C. A. 67-906 (2) which requires foreign irregular route motor carriers, such as complainants, to report to the Commission the total mileage traveled into, within and through the state as well as the total mileage into, within and through the various cities and counties of the state during a calendar year is unreasonable and impossible of performance; and, therefore, unconstitutional and void in violation of the commerce clause of the Federal Constitution.

It is further insisted that complainants did not have property habitually, continuously or with such frequency during the year 1958 in this state as to cause their property to have a situs in the state and especially in any county or city of the state for the purpose of local taxation for the biennum of 1959-60.

The defendants answered the petition in which it was denied that T. C. A. 67-906 (2) cast an unreasonable or impossible burden upon interstate commerce; and that complainants did not have trucks or vans in the state with such frequency to have a tax situs in Tennessee and its political subdivisions.

Prior to the trial Aero Mayflower Transit Company was permitted to withdraw as a party complainant.

The proof shows and the Chancellor found as a fact that it would be impossible for complainants to accurately log each and every mile traveled in each and every city and county of the state during a calendar year. However, he further found the Commission had not demanded a strict or literal compliance with this section of the Act. But had to the contrary accepted and based the assessments against those complainants which had furnished statements of mileage their trucks had traveled within, into and through Tennessee during the year 1958. Thus, he held they were not in a position to urge the unconstitutionality of the statute in this respect.

He dismissed the bill as to the nine complainants which had refused to furnish the Commission with any information as to the mileage their trucks had traveled in Tennessee during the year 1958 under authority of T. C. A. 67-913, which provides:

> "The owner of any such property refusing or failing to file such schedules and statements shall be deemed to have waived the mode and manner of ascertaining the value of such property, and of the distribution or allocation by the Tennessee Public Service Commission of such valuation or assessment to the various counties and municipalities of the State of Tennessee for the purposes of county and municipal taxation, and shall not be permitted to be heard in opposition to the valuation fixed upon said property by the Commission, nor in opposition to the distribution or allocation of same by the Commission to the various counties and municipalities for the purposes aforesaid."

He further held the tax was a state tax and not a local one.

He also declined to make a declaration of the rights and obligations of complainants under the Act.

Accordingly, he dismissed the petition.

Complainants have appealed to this Court and have in their very able and well prepared brief stated they rely upon the following three propositions:

> "1. The taxes for which assessment is provided under T. C. A. 67-901, et seq., are local taxes, and are not State taxes.
>
> "2. Under the due process clauses of the Federal and State constitutions a county, municipality, or taxing district cannot levy a tax upon personal property of a non-resident unless personal property of the non-resident has acquired a tax situs therein by being regularly and habitually within said county, municipality or taxing district.
>
> "3. The requirement contained in T. C. A. 67-906 that irregular route carriers shall report the number of vehicle miles operated in each county, municipality or taxing district in the State imposes upon the Appellants an impossible task, and one where even attempted compliance is very expensive, causes great delays and creates dangerous highway hazards. Such provision therefore creates an undue burden upon interstate commerce, and is void under the commerce clause of the United States Constitution. Since same is void, T. C. A. 67-913 must likewise be void, for the Appellants cannot be deemed to have waived the method of assessment and distribution thereof by failing to comply with a void requirement."

Conceding that the tax is local and not a state tax, yet that fact does not render the assessments void. The Commission is the proper authority for making assessments against complainants for local ad valorem taxation.

"The Tennessee Public Service Commission under T. C. A. 67-601 et seq., is the single agency required to assess for ad valorem taxation the property of all utilities and carriers operating in this state." Howard Sober, Inc. v. Clement, ... Tenn. App. ..., 372 S. W. (2d) 202.

Article 2, Section 28 of our Constitution provides in part as follows:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State."

As to complainants' second proposition in which it is insisted that a county or a city may not levy a tax on personal property of a nonresident unless such property is regularly and habitually within its boundaries, we think has been settled by the reported decisions of this Court and our Supreme Court.

In the case of E & L Transport Company v. Ellington, ... Tenn. ..., 371 S. W. (2d) 456, it is said:

"Therefore, we conclude that:

"(1) appellants are irregular route motor carriers operating into or through Tennessee in interstate commerce;

"(2) such portion of their properties as is represented by the ratio of their Tennessee mileage to their total mileage has a Tennessee situs and is to be assessed for ad valorem tax purposes by the Tennessee Public Service Commission under T. C. A., Section 67-901 et seq.;

"(3) said statute is a valid and constitutional enactment, and has been so held without exception by the appellate courts of this State."

In the case of Howard Sober, Inc. v. Clement, supra, this Court said:

> "This statute was drafted and passed for the express purpose of furnishing statutory authority for the assessment of ad valorem taxes upon the property of irregular route haulers which was in Tennessee under such circumstances as to warrant its taxation. In the preparation of the statute, free use was made of other statutes enacted for similar purposes."

In the case of Jack Cole Company v. Ellington, ... Tenn. App. ..., 372 S. W. (2d) 204, wherein the same proposition was before the Court, it is said:

> "The record shows that a fair proportion of appellant's properties are used in Tennessee, although at irregular intervals, and that petitioner receives the benefit of Tennessee's laws, its roads and its other facilities thus enabling it to carry on its business in this State. And, although we cannot determine a fixed situs for these properties at any specific place, nevertheless, the statute provides that property so used in this State on the highways shall 'Be deemed to have a situs in Tennessee.' Thus, we think that the action of the Public Service Commission was tantamount to finding as a fact that such properties are so used in Tennessee as to come within this statute and therefore, have a situs in the State."

The foregoing finding of the Court finds support in the case of Central R. R. v. Pennsylvania, 370 U. S. 607, wherein it is said:

> "• • • A nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 Ct. 599,

this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax year, although it was agreed by the parties that the cars 'never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains.' Id. 174 U. S. at 72. Habitual employment within the state of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average number of cars so engaged."

In Volume 17, No. 3 of the Vanderbilt Law Review, June, 1964, at pages 1161, 1162 and 1163, there is a discussion of the three opinions of our Supreme Court and this Court in which the constitutionality of T. C. A. 67-901, et seq., the statute under consideration, was upheld, wherein it is said:

"Taxes imposed on interstate carriers for the privilege of engaging in interstate commerce are forbidden by the commerce clause. This has not generally been true with respect to local property taxes *applied to* vehicles of interstate commerce. Although vehicles are employed to transport interstate commerce, that fact alone does not afford either due process or commerce clause insulation from nondiscriminatory state and local property taxes. A property tax on the vehicles of interstate commerce, such as barges, tank cars, pipe lines, rolling stock, trucks, buses, and airplanes is a familiar type of sanctioned tax. As to vehicles moving in interstate land transportation, such as in the three cases at hand, it has long been settled that a non-domiciliary state can levy a property tax on the basis of the 'fair average' number of vehicles permanently within the taxing state during the tax

year, although the individual vehicles traveling into, through, and out of the state differ. Vehicles of interstate transportation, if moving over fixed routes and regular schedules, may thus acquire a tax situs in several states, providing the states fairly apportion the taxes. The tax is open to attack on both due process and commerce clause grounds where it is not fairly apportioned to the use of the vehicles within the taxing state as compared to their use without.

* * * * * * *

"While it may be more difficult fairly to apportion a tax where the interstate carrier does not have a regular, scheduled route, as in the three cases at hand, nevertheless, such carriers should also pay their fair share of the cost of the state and local governments whose protection they receive and whose opportunities and benefits they enjoy. Moreover, exemption of these carriers from the tax would give them a competitive advantage over local carriers who must shoulder the tax burden."

Complainants admit they used a fair proportion of their properties in this State and received the benefit of our laws, roads, and other facilities during the year 1958. We quote from the petition:

"Petitioners admit and do not deny the fact that in the conduct of their business most of them have had vans and trucks in the State of Tennessee at various times and at various places, and certain of them have had property in the State habitually or continuously, but not in any county or city of the State."

We understand the complainants insist by their third assignment a strict compliance of T. C. A. 67-906 (2) on their part would result in an undue burden on interstate commerce. Conceding this to be true, yet it is obvious

to us from this record that the Commission has not insisted upon a strict compliance with this section of the Act. But, to the contrary, has accepted and based its assessments upon the information furnished by those complainants reporting mileage in the State which are at best estimates of miles traveled in the State during the year 1958. There is no insistence on the part of any of the complainants that such a construction of this section of the Act places a burden on interstate commerce.

Revenue laws are construed against the State and in favor of the taxpayer and a substantial compliance is all that is required. We are of the opinion the Commission has applied this rule in this case.

Under such circumstances we think the Chancellor was correct in finding the complainants were in no position to urge the unconstitutionality of the statute on this ground.

In the case of West v. Carr, ... Tenn. ..., 370 S. W. (2d) 469, our Supreme Court said and quoted with approval the following:

> "In these circumstances, it is plain that complainant's bill fails to state a cause under our Declaratory Judgments Act. That Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. Ball v. Cooter et al., 185 Tenn. 631, 634, 207 S. W. 2d 340, 342; Coleman v. Henry, 184 Tenn. 550, 554, 201 S. W. 2d 686; Jared et al. v. Fitzgerald et al., 183 Tenn. 682, 688, 689, 195 S. W. 2d 1, 4; Newsum v. Interstate Realty Co., 152 Tenn. 302, 278 S. W. 56; Annotations, 12 A. L. R. 52, 69, 87 A. L. R. 1205, 1215-1219.
>
> "It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts. Hodges v. Hamblen

County, 152 Tenn. 395, 399, 277 S. W. 901; Ball v. Cooter et al., supra; Jared et al. v. Fitzgerald et al., supra.

"'We will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation. Phillips v. West, 187 Tenn. 57, 213 S. W. 2d 3, 5' (State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 444, 225 S. W. 2d 263, 268). State ex rel. West v. Kivett, 203 Tenn. 49, 56, 308 S. W. 2d 833.

"The rule is the same, we understand, in the federal courts. 'Claims based merely upon "assumed potential invasions" of rights are not enough to warrant judicial intervention. Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154 (1169).' Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324-325, 56 S. Ct. 466, 472-473, 80 L. Ed. 688, 699.

"Under the Federal Declaratory Judgment Act, as we understand, the rule is this: 'It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts' (Citing cases). Aetna Life Ins. of Hartford Co. v. Haworth, 300 U. S. 227, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617, 621; Electric Bond & S. Co. v. Securities & Exch. Com., 303 U. S. 419, 443, 58 S. Ct. 411, 82 L. Ed. 936, 948.

"'This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly ad-

hered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"' (citing cases). United States v. Raines, 362 U. S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529."

Finally, the insistence of complainants the waiver section of the Act, T. C. A. 67-913, is void must fail since this insistence depended upon our finding the statute unconstitutional under complainants' third proposition which we have considered and found without merit.

It results complainants' assignments of error are overruled and the decree of the Chancellor is affirmed with costs.

Chester O. Chattin,
Judge.

Bejach, J., concurs.

Shriver, J., not concurring.

Humphreys, J., not participating.

APPENDIX 3.

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati,Ohio 45202

Carl W. Reuss
Clerk

November 17, 1966

Stephenson, Lackey and Holman
236 Fourth Avenue North
Nashville, Tennessee
Cordish and Cordish
1613 Munsey Building
Baltimore, Maryland

Re: Alterman Transport Lines, Inc., et al.
vs. Public Service Commission of
Tennessee, et al.
(D. C. No. 4417, Civil)

Gentlemen:

Enclosed is a copy of the Court's order entered today in the above-entitled case.

Yours very truly,

Carl W. Reuss,
Clerk,
Mary M. Lohre,
Deputy Clerk.

CC: Mr. Milton P. Rice
Mr. Eugene W. Ward
Mr. Seymour Samuels, Jr
Mr. William H. Williams
Mr. Patrick Johnson, Sr.
Mr. William W. O'Hearn
Mr. Earl S. Ailor
Mr. W. P. Boone Daugherty
Messrs. Eugene N. Collins and Ellis K. Meacham
Mr. James F. Turner
Mr. Robert M. Summitt

United States Court of Appeals
For the Sixth Circuit.

Alterman Transport Lines, Inc., et al.,
Appellants,

vs.

Public Service Commission of Tennessee, et al.,
Appellees.

Civil Action.
No. .....

Upon reading and filing the annexed Motion, dated the 9th day of November, 1966, it is

Ordered that the time of the Appellants to file the record on appeal herein and to take all steps necessary to the prosecution of this appeal and to docket the same, be and the same is hereby extended until thirty (30) days after the rendering of a final judgment on Appellants' direct appeal now pending before the Supreme Court of the United States.

Dated: Nov. 17, 1966.

John W. Pach,
Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 942

ALTERMAN TRANSPORT LINES, INC., ET AL.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.,
Appellees.

APPELLANTS' OPPOSITION TO MOTION TO DISMISS

Summary of Appellees' Argument (Jurisdiction of Appeal)

Appellees base their Motion to Dismiss on the ground that the constitutional issues in this case do not raise a federal question substantial enough to uphold the lower court's decision to invoke three-judge court jurisdiction. In this regard, they rely on a decision of the Tennessee Court of Appeals which, on appeal to this Court, was summarily dismissed for lack of a substantial federal question (See *Burham Van Service, et al. v. Cayce R. Pentecost, et al.*, 382 U.S. 106 (1965). The decision of the Tennessee Court of Appeals is set out in Appendix two of Appellees' Motion to Dismiss, herein). Appellees, however, incorrectly state in their Motion that the *Burham* case contains

the "same factual and constitutional issues" as the instant case. A comparison of the two cases clearly indicates that there are at least three entirely different and new arguments raised in Appellants' Bill of Complaint which were not presented or mentioned in the *Burham* case (See for example, the argument summarized in footnote two of Jurisdictional Statement). The new contentions present several definite and uncontroverted bases for sustaining three-judge court jurisdiction; therefore, it is unnecessary at this time to examine the *Burham* decision.

A most important factual distinction between the two cases illustrates one of the bases for sustaining the lower court's decision to invoke three-judge court jurisdiction. In the instant case, many of Appellants, in accordance with the forms and instructions sent to them by Defendants biannually from 1958 to the present, have literally complied with the requirements of *Tennessee Code Annotated,* Title 67, Section 906 B (2) and have reported their total miles travelled in Tennessee computed separately as to Counties, Municipalities, and taxing districts. The carriers in the *Burham* case found this reporting requirement to be so burdensome that they did not even attempt same. Consequently, the court in *Burham* refused to consider whether or not *T.C.A.* 67-906 B (2) unduly burdened interstate commerce in violation of Article I, Section 8 of the Constitution of the United States. What is important for present purposes, however, is that the State Court conceded that if the strict compliance which exists in the instant case were present, an undue burden on interstate commerce would be demonstrated (See the Court's Opinion set out in Appellees' Motion, at pages 22-25). This burden (and the resulting constitutional violation) is of itself sufficient basis for upholding the lower Court's decision to invoke three-judge court jurisdiction and to render its

final decree as a three-judge court. Therefore, the three-judge court having been properly convened, the jurisdiction of this Court over this appeal must be sustained.

The Questions Presented Are Of Substantial National Importance

Appellees Have Admittedly Applied Ad Valorem Taxes Against Interstate Common Carriers in Violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Consequently, It is the Duty of a United States District Court to Exercise Its Jurisdiction Over This Matter Without Regard to the Value of the Matter in Controversy.

Appellants demonstrated below that Appellees have taxed their property for Ad Valorem purposes at approximately 100% of actual value, while property locally assessed in Tennessee and similarly situated under the laws and constitution of Tennessee has been assessed at no more than 50% of actual value. The lower Court held that this discrimination in assessment ratios raised a substantial federal question under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (See Lower Court Opinion at page 6a, Appendix One of Jurisdictional Statement). Moreover, when this *identical* practice was considered on its merits, the federal District Court for Tennessee found a definite Equal Protection violation (See *Louisville & Nashville R. Co. v. Public Service Comm'n of Tenn.*, 249 F. Supp. 894 (M.D. Tenn., 1966)). It is so clear that *T.C.A.* 67-901-931 is discriminatorily applied against Appellants that Appellees did not dispute this point below, and before this Court concede that "there may be . . . substantial federal questions involved in the case" (See page 10 of their Motion).

Despite its conclusion that interstate commerce was taxed in a discriminatory and unequal manner the lower

Court refused to invoke federal jurisdiction on the grounds of insufficient "amount in controversy." The Court's requiring and method of computing a minimum "amount in controversy", coupled with its correct holding that the state courts of Tennessee do not provide an adequate remedy to redress the conceded discrimination, leave Appellants no forum in which to seek relief from an admittedly discriminatory tax. Under this decision, the only restriction on a State's discriminatory taxation of interstate commerce is its ingenuity in manipulating the form in which taxes are collected. In Tennessee, ninety-five counties and approximately three hundred municipalities collect state assessed ad valorem taxes from Appellants, and each of these subdivisions is now free to discriminate against each of Appellants in an amount up to $9,999.00. As the *total liability within the State of Tennessee* for each of Appellants, with a few exceptions, far exceeds the $10,000.00 requirement for federal jurisdiction, the denial of jurisdiction on the basis of "insufficient amount in controversy" completely subverts Congress's objectives in specifying a jurisdictional minimum. Equitably, a just computation of this amount is an impossibility due to a state's ability to divide its ad valorem taxes among countless subdivisions. In addition, there is no legal basis for requiring same under the facts of the instant case (See Jurisdictional Statement at pages 16-31). It is respectfully submitted that the questions presented herein are of substantial national importance vitally affecting the free flow of commerce among the states and the functioning of the federal courts; and that, for the reasons set out in the Jurisdictional Statement, the lower Court's decision should be summarily reversed.

Conclusion

For these reasons it is respectfully submitted that the Motion to Dismiss be denied and that the Court either reverse the decision below or else note probable jurisdiction of this appeal.

DAVID S. CORDISH,

Cordish & Cordish,
Baltimore, Maryland,

J. G. LACKEY, JR.,

Stephenson, Lackey & Holman,
Nashville, Tennessee,

Attorneys for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 942

ALTERMAN TRANSPORT LINES, INC., ET AL.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.,
Appellees.

APPELLANTS' PETITION FOR REHEARING

Appellants present their Petition for a Rehearing of the above entitled case, and, in support thereof, respectfully show:

Grounds for Rehearing

On March 13, 1967, this Court accepted jurisdiction over this appeal by affirming the judgment of a specially convened District Court. This District Court, from which a direct appeal to this Court was taken, rendered its decision as a three-judge court. However, it gave no basis for so doing other than stating that Petitioners requested same in their Bill of Complaint (see the opinion below, set out in Jurisdictional Statement, Appendix I at p. 1-A). Moreover, every allegation in Petitioners' Bill of Complaint constituting the basis for three-judge court jurisdiction, i.e., the

per se unconstitutionality of the Tennessee state statute in question, was rejected by the Court below as not raising a substantial Federal question. The *only* grounds on which the said Court found a substantial Federal question was based upon the discriminatory *application*, against Petitioners, by the Tennessee tax officials, of *Tennessee Code Annotated* 67-901-931. This Court has held on numerous occasions, that the discriminatory application of a state statute, constitutional on its face, does not raise the kind of Federal question which sustains three-judge court jurisdiction (see, for example, *Ex Parte Bransford*, 310 U.S. 354 [1940]). Thus, the lower Court's decree of a final judgment as a three-judge court is inconsistent with, and contradictory to, the conclusions which the Court reached in its opinion.

Defendants recognize the incorrectness and the inconsistency of the action of the Court below, and did not request that this Court affirm the lower Court decree. *The only motion before the Court is Defendants' Motion to remand the case to the Sixth Circuit Court of Appeals.* This Motion is based on the contention that the Court below improperly rendered a final judgment as a three-judge court. It is concerned entirely with the proposition that, as there is nothing in the lower Court opinion which justifies the invoking of three-judge court jurisdiction, there is no basis for sustaining the jurisdiction of this Court in this appeal. Defendants' conclusion that it is impossible for this Court to affirm a three-judge opinion which states no basis for three-judge court jurisdiction, and that, if the opinion of the lower Court is to be affirmed, it must be done by the Circuit Court of Appeals, is uncontrovertable. *In order for this Court to exercise jurisdiction over this direct appeal, some portion of the decision below must be reversed.* It is completely without precedent for this Court to accept juris-

diction over a direct appeal by affirming a lower court opinion which contains no basis for three-judge court jurisdiction. Unless this case is required to be heard and determined by a district court of three judges under 28 *U.S.C.* §2281, it cannot be brought to this Court on direct appeal under 28 *U.S.C.* §1253. The mere fact that a specially convened district court has acted as a three-judge court is insufficient to invoke the jurisdiction of this Court on direct appeal unless it is determined by this Court that the Bill of Complaint does *in fact* contain a basis for three-judge court jurisdiction, i.e., an allegation which raises a substantial Federal question on the grounds that a state statute is unconstitutional on its face (see, for example, *Bailey v. Patterson*, 369 U.S. 31 [1962], and *Phillips v. United States*, 312 U.S. 246 [1941]).

While there are several allegations in Petitioners' Bill of Complaint which meet this requirement and justify the invoking of three-judge court jurisdiction, *all* these arguments were rejected by the Court below. Petitioners cannot ascertain the nature of the grounds upon which this Court concluded that a substantial Federal question was raised as to the *per se* unconstitutionality of the State of Tennessee Statute. However, it is respectfully submitted that whatever the basis for this Court having found the existence of a substantial Federal question sufficient to sustain three-judge court jurisdiction, such a conclusion is completely inconsistent with the lower Court's opinion.

In rejecting, in its opinion, all arguments which raised the kind of substantial Federal question necessary to sustain three-judge court jurisdiction, the lower Court dismissed the identical arguments which invoke Federal jurisdiction under 28 *U.S.C.* §1337 (see the Jurisdictional Statement at pp. 24-31 as to jurisdiction under Section 1337; see also Appellants' Opposition to Motion to Dismiss at p. 2 where

the same ground as set forth on pp. 24-31 of the Jurisdictional Statement is cited as a basis for three-judge court jurisdiction). Section 1337 provides for Federal jurisdiction without regard to the amount in controversy in situations where interstate commerce is unduly restrained in violation of the *Interstate Commerce Act*, or other Federal acts, by state statute or otherwise. The lower Court concluded that jurisdiction should be denied under this Section despite its holding as to the discriminatory application of the Tennessee taxing statute and the substantial Federal question which it felt was raised by this practice; however, when the *additional* Federal question concerning the *per se* unconstitutionality is added (which was not considered by the lower Court) Federal jurisdiction is definitely invoked under Section 1337 of the *Code*. Thus, if this Court has decided that a three-judge court kind of substantial Federal question is present, then there must be a reversal of the lower Court on at least the issue of Section 1337 jurisdiction. A final judgment rendered by a three-judge district court can be affirmed by direct appeal to this Court only, if in fact, there is a basis for three-judge court jurisdiction in the Bill of Complaint. Since the Court below rejected, in its opinion, the presence of a basis for three-judge court jurisdiction, an affirmance of the *judgment* below necessitates, for the reasons stated, a reversal of the lower Court's *opinion* on the merits of this appeal.

There is an additional reason why the decision below should be reversed. The lower Court concluded that the State Courts of Tennessee provide no adequate remedy to redress Defendants' discriminatory taxation of Petitioners' property. An affirmance of this opinion leaves Petitioners with *no* forum in which to seek relief from what is admitted by the Defendants to be a discriminatory taxing practice, and from a practice which has been held by the United

States District Court in Tennessee to result in a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (see *Louisville & Nashville R. Co. v. Public Service Comm'n of Tenn.*, 249 F. Supp. 894 [M.D. Tenn. 1966]). As to certain allegations in the instant case the Court below specifically held that there was no distinction between the facts of this case and those in the *L&N* case except the amount of the discriminatory taxation involved (see the Opinion below set out in the Jurisdictional Statement, Appendix I at page 11-A, footnote 5). In both cases the District Courts held that as to the systematic, intentional, and discriminatory taxing practice of Defendants, there is no remedy in the State Courts of Tennessee. The *L&N* Court summarized (in effect) the holding of the two cases on this point as follows:

> (*Louisville & Nashville R. Co. v. Public Service Comm'n of Tenn., supra,* at p. 249 F. Supp. 904). . . . Since there is no plain, speedy, and efficient remedy in Tennessee to correct the intentional and systematic violations of either its own law or the Fourteenth Amendment, *Federal declaratory injunctive relief is not only proper but necessary for the protection of plaintiff's constitutional rights.* (emphasis added).

In the *L&N* case the interstate carrier was discriminated against in the sum of many millions of dollars, and is rightfully provided a legal forum in the federal courts. The carriers in the instant case are discriminated against in terms of thousands of dollars, (with less than $10,000 being involved in any single subdivision of Tennessee) and are denied a forum in *any* court. The reasons for this inequitable situation result from the opinion of the Court below to the effect that federal jurisdiction cannot be invoked under the *Civil Rights Act* (28 *U.S.C.* 1343(3)) in "tax matters". Such a conclusion runs counter to previous

opinions of this Court (see *Snowden v. Hughes*, 321 U.S. 1, 9 [1944]) and is illogical and incompatible with a fair and just legal system.

An affirmance of the lower Court opinion gives free rein, within certain dollar limits, to the State of Tennessee and other states, to *tax any given segment of society in a discriminatory manner*, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The group or person discriminated against will have no redress to the Courts unless, as in the *L&N* case, they are wealthy enough to have tremendous sums of money involved in the discrimination. It is inconceivable that this Court would approve a jurisdictional rule, applicable in all fifty states, which penalizes a person who is not wealthy enough to be discriminated against in large amounts. The repercussions that the adoption of such a rule would have on jurisdictional practice in the United States District Courts are literally catastrophic. *States and/or local subdivisions could discriminate, on the basis of race, religion, wealth, or as in the instant case, on interstate carriers as opposed to other property owners, provided they* **accomplished this discrimination through taxation** *and within certain dollar limits. Under the opinion below, "redheads" may be taxed in a discriminatory manner in favor of "blondes" similarly situated under the law, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and a federal forum will be denied unless the discrimination results in a tax detriment to each individual "redhead" of at least $10,000.00. The only possibility for federal jurisdiction in a tax discrimination situation is 28 U.S.C. 1343(3).*

If the lower Court opinion is affirmed, it is not difficult to foresee the groups or persons who will, in the future, be substituted for Alterman Transport *et als.*, and the new

types of taxes which will be imposed with an impact similar to that of the Tennessee Ad Valorem Tax. It is respectfully submitted that the unconscionable effects which must inevitably flow from an affirmance of the opinion below necessitate a reversal by this Court of its previous decision in this case.

Conclusion

For the foregoing reasons it is respectfully urged that the Petition for a Rehearing be granted, and that, upon further consideration, the judgment of the Three-Judge District Court, Middle District of Tennessee, be reversed.

DAVID S. CORDISH,
Cordish and Cordish,
Baltimore, Maryland

J. G. LACKEY, JR.,
Stephenson, Lackey & Holman,
Nashville, Tennessee,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I, J. G. Lackey, Jr., counsel for the above named Appellants, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

J. G. LACKEY, JR.,

PROOF OF SERVICE

I, J. G. Lackey, Jr., one of the attorneys for the appellants herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of April, 1967, I served copies of the foregoing Petition for Rehearing to the Supreme Court of the United States on the several parties thereto by mailing copies thereof with postage prepaid to their attorneys as follows:

Honorable Milton P. Rice
Supreme Court Building
Nashville, Tennessee
(State Board of Equalization of Tennessee)

Honorable Eugene W. Ward
Public Service Commission
Cordell Hull Building
Nashville, Tennessee
(Public Service Commission)

Honorable Seymour Samuels, Jr.
Metropolitan Government
204 Courthouse
Nashville, Tennessee
(Metropolitan Government of Nashville & Davidson County, Beverly Briley, Mayor, and Metropolitan Trustee)

Honorable William H. Williams
County Attorney
Shelby County Courthouse
Memphis, Tennessee
(County Attorney for Shelby County, Jack Ramsey, Ch. County Commission, & Riley Garner, Trustee)

Honorable Patrick Johnson, Sr.
Commerce Title Building
Memphis, Tennessee
(City of Memphis, William B. Ingram, Mayor, and C. W. Crutchfield, Controller)

Honorable William W. O'Hearn
Commerce Title Building
Memphis, Tennessee
(City of Memphis, William B. Ingram, Mayor, and C. W. Crutchfield, Controller)

Honorable Earl S. Ailor
Bank of Knoxville Building
Knoxville, Tennessee
(Attorney for Knox County, C. Howard Bozeman, County Judge, and Robert L. Broome, Trustee)

Hon. W. P. Boone Daugherty
Deputy Director of Law
City of Knoxville
Knoxville, Tennessee
(City of Knoxville and Leonard Rogers, Mayor)

Honorable Eugene N. Collins
Honorable Ellis K. Meacham
1115 Hamilton Bank Building
Chattanooga, Tennessee
(City of Chattanooga, and Ralph Kelly, Mayor)

Honorable James F. Turner
600 Maclellan Building
Honorable Robert M. Summitt
415 Maclellan Building
Chatanooga, Tennessee
(Attorney for Hamilton County, Chester Frost, County Judge, and Joe W. Richardson, Trustee)

J. G. LACKEY, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ALTERMAN TRANSPORT LINES, INC., ET AL. *v.* PUBLIC SERVICE COMM'N OF TENNESSEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 942. Decided March 13, 1967.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.